DOCKET

No. 08-724
Title: Keith Smith, Warden, Petitioner
v.
Frank G. Spisak, Jr.
Docketed: December 4, 2008
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (03-4034)
Decision Date: January 11, 2008
Rehearing Denied: July 28, 2008
Questions Presented

Date	Proceedings and Orders
Oct 14 2008	Application (08A339) to extend the time to file a petition for a writ of certiorari from October 26, 2008 to December 10, 2008, submitted to Justice Stevens.
Oct 17 2008	Application (08A339) granted by Justice Stevens extending the time to file until December 10, 2008.
Dec 1 2008	Petition for a writ of certiorari filed. (Response due January 5, 2009)
Dec 1 2008	Appendix of Keith Smith, Warden filed.
Dec 29 2008	Brief of respondent Frank G. Spisak, Jr. in opposition filed
Jan 12 2009	Motion for leave to proceed in forma pauperis filed by respondent.
Jan 12 2009	Reply of petitioner Keith Smith, Warden filed. (Distributed)
Jan 14 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 4 2009	Record Requested .
Feb 11 2009	Record received from the U.S.C.A. for the Sixth Circuit (1 binder only).
Feb 18 2009	Record received from the U.S.D.C. for the Northern District of Ohio (Cleveland)
Feb 23 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Feb 23 2009	Petition GRANTED.
Feb 27 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 26, 2009.
May 22 2009	Joint appendix filed. (2 Volumes). Statement of costs received.
May 22 2009	Brief of petitioner Keith Smith, Warden filed.
May 29 2009	Brief amici curiae of Pennsylvania, et al. filed.
Jun 1 2009	Motion to appoint counsel filed by respondent Frank G. Spisak (Page 2) (CL Page 162)
Jun 5 2009	The time within which to file respondent's brief on the merits is extended to and including August 7, 2009.
Jun 17 2009	Motion DISTRIBUTED for Conference of September 29, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Tuesday, October 13, 2009.
Jul 17 2009	CIRCULATED.
Aug 7 2009	Brief of respondent Frank G. Spisak, Jr. filed. (Distributed)
Aug 14 2009	Brief amici curiae of Steven Lubet, et al. filed. (Distributed)
Sep 3 2009	Reply of petitioner Keith Smith, Warden filed. (Distributed)
Sep 30 2009	Motion to appoint counsel filed by respondent GRANTED. Michael J. Benza, Esquire, of Chagrin Falls, Ohio, is appointed to serve as counsel for the respondent in this case.
Oct 13 2009	Argued. For petitioner: Richard Cordray, Attorney General, Columbus, Ohio. For

respondent: Michael J. Benza, Chagrin Falls, Ohio (Appointed by this Court.)

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-724 DEC 1 - 2008

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

KEVIN SMITH, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE — NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

LIST OF PARTIES

The Petitioner is Kevin Smith, the Warden of the Mansfield Correctional Institution. Smith is substituted for his predecessor, Betty Mitchell. See Fed. R. Civ. P. 25(d).

The Respondent is Frank Spisak, an inmate at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Kevin Smith, the Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinions and orders are reproduced at App. 1a-20a, 22a-94a. The United States District Court for the Northern District of Ohio's opinion and order is reproduced at App. 95a-300a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's petition for rehearing on July 28, 2008. Justice Stevens extended the time period to file a petition for writ of certiorari to December 10, 2008. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

INTRODUCTION

This Court has seen this case before. Just last Term, the Court granted the Warden's petition for certiorari, vacated the Sixth Circuit's opinion granting the writ, and remanded for reconsideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007). The implication of the Court's remand order was unmistakable: The Court directed the Sixth Circuit to observe carefully the limitations of the Antiterrorism and Effective Death Penalty Act of

1996 ("AEDPA"), 110 Stat. 1219, when considering a claim for habeas relief.

On remand, the Sixth Circuit again ignored AEDPA's constraints on the court's habeas power when it reinstated its earlier grant of the writ. The Warden accordingly asks the Court to review this case for two reasons.

First, the Sixth Circuit exceeded its authority by granting habeas relief based on its finding that so-called "unanimity" and "acquittal-first" instructions violate *Mills v. Maryland*, 486 U.S. 367 (1988). Contrary to both AEDPA and this Court's directive in *Musladin*, the Sixth Circuit applied its own interpretation of *Mills* to resolve questions that were not decided or addressed in *Mills*, and on which this Court has provided no clear guidance. Numerous decisions of other circuits—and even of the Sixth Circuit itself—have rejected claims similar to Spisak's precisely because *Mills* did not address such claims.

Second, the Sixth Circuit improperly presumed that Spisak suffered prejudice from several allegedly deficient statements made by trial counsel during his closing argument. In *Bell v. Cone*, 535 U.S. 685 (2002), this Court directed habeas petitioners to apply *Strickland v. Washington*, 466 U.S. 668 (1984), when challenging such single, discrete acts of trial counsel. And the Ohio courts reasonably rejected Spisak's claim of ineffective assistance under the *Strickland* standard. Trial counsel's decision to reference the aggravating circumstances of Spisak's crimes in his closing argument was reasonable—and non-prejudicial—given the indisputably heinous and unprovoked nature of the murders, Spisak's lack of

remorse, and Spisak's on-the-stand descriptions of his depraved motives and beliefs.

The Court should again grant the Warden's petition and reverse the Sixth Circuit's judgment.

STATEMENT OF THE CASE

A. Spisak killed three people and seriously injured a fourth during a hate-inspired campus shooting spree.

Respondent Frank G. Spisak, Jr. killed Horace T. Rickerson, Timothy Sheehan, and Brian Warford in a series of shootings at Cleveland State University in 1982. App. 29a-31a. During the spree, Spisak also shot at John Hardaway and Coletta Dartt. Hardaway was shot seven times but survived and identified Spisak as the shooter. App. 29a.

Spisak's hatred of African Americans and Jews motivated the murders. App. 84a. When the police arrested Spisak, they found a book about Adolf Hitler that was hollowed out to conceal a gun, a "white power" tee shirt, and a Nazi flag. At trial, Spisak testified that he admired Hitler, and that he was a member of a splinter group of the American Nazi Party. App. 375a-382a. Spisak also told the investigating officer that he planned to go to a downtown bar with a machine gun and just "open up" on every black person that was there; that he was then "going to start on all the Jewish lawyers"; and that he wanted to kill all the Jewish lawyers, "one by one." App. 369a-370a.

B. A jury convicted Spisak and recommended a sentence of death, which the state trial court accepted.

During the guilt phase of Spisak's trial, the defense did not contest that Spisak shot the victims; instead, it sought unsuccessfully to establish that Spisak was legally insane. The defense attempted to explain Spisak's Nazi beliefs as a symptom of mental illness, eliciting lengthy testimony from Spisak regarding the nature of his beliefs. See, e.g., App. 371a-388a. The defense also offered the testimony of Dr. Oscar Markey, who gave contradictory testimony concerning whether Spisak was mentally ill at the time of the crimes. The trial court ultimately struck Dr. Markey's testimony, App 43a, and refused to instruct the jury on insanity, App. 53a-54a.

The jury returned a guilty verdict on, among other charges, four counts of aggravated murder with nineteen death specifications.

At sentencing, Spisak's counsel presented additional expert testimony that Spisak was mentally ill. A clinical psychologist testified that Spisak suffered from Schizotypal and Borderline Personality Disorders characterized by bizarre and paranoid thinking, gender identification conflict, and emotional instability, and that these defects substantially impaired Spisak's ability to conform to the law. (Trial Tr. 2429-40; Joint Appendix to Sixth Circuit case no. 03-4034 ("J.A.") at 2602-13). A psychiatrist similarly testified that Spisak suffered from schizotypal personality disorder—a mental condition that substantially impaired his ability to conform his conduct to the requirements of the law. (*Id.* at 2549-54; J.A. at 2722-27). Finally, Dr.

Markey again testified, stating that he essentially agreed with the psychiatric diagnosis. (*Id.* at 2704-06; J.A. at 2877-79).

In his closing argument, Spisak's counsel acknowledged the brutality of the aggravating circumstances and expressed sympathy for the victims' families. App. 333a-336a. Counsel then argued that although Spisak had not led a "good life" and had no "good deeds" to his credit, Spisak's mental illness was a mitigating factor that the jury should consider. App. 338a-341a. Counsel then argued extensively that although the defense's expert testimony was insufficient to meet the test for legal insanity, it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances. App. 340a-355a. Finally, counsel concluded by telling the jurors that he was proud of them for doing their duty. App. 359a-360a.

In its sentencing instructions to the jury, the court explained that the State had "the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the [sentence] of death." App. 318a. The court further instructed that "to outweigh means to weigh more than, to be more important than," and that "[t]he existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors." *Id.*

The court explained that the aggravating factors were those death specifications that the jury had already returned guilty verdicts on during the guilt phase. App. 319a-323a.

The trial court then stated that "[m]itigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment." App. 323a. The court specifically listed as a mitigating factor that "at the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." *Id.* The court also instructed the jury that it could consider "the history, character and background of the offender" as a mitigating factor, as well as "any other factors[] that are relevant to the issue of whether the defendant should be sentenced to death." *Id.* The court did not instruct the jury that it needed to reach a unanimous conclusion as to the presence or absence of the mitigating factors.

The court then summarized the Ohio statute setting forth the proper jury sentencing procedure:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine whether, beyond a reasonable doubt, the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the

separate counts are sufficient to outweigh the mitigating factors present in this case.

If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court.

I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.

A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.

On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

App. 323a-324a.

The court then described in detail the verdict forms that the jury would be required to complete. The first stated,

> We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the sentence of death be imposed . . . .

App. 325a. The court noted that "there [wa]s a spot for twelve signatures" at the bottom of the form, and that "[a]ll twelve of [the jurors would] sign it if that [wa]s [their] verdict." *Id.*

The second form, similarly, stated,

> We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving [the life sentence selected by the jury].

App. 325a-326a. The court noted that "again, all twelve of [the jurors] must sign whatever verdict it is you arrive at." App. 326a.

The jury recommended a sentence of death, which the trial court accepted. App. 27a.

C. The Ohio Supreme Court rejected Spisak's jury instruction and ineffective assistance of counsel claims on the merits.

On direct review, the Ohio court of appeals vacated one of the four aggravated murder convictions and the accompanying specifications, and affirmed the remainder of Spisak's convictions. App. 97a. Spisak obtained new counsel and moved for a second round of review before the Ohio court of appeals, which the Ohio Supreme Court granted. The Ohio appeals court again affirmed Spisak's convictions. App. 98a-99a.

On appeal, the Ohio Supreme Court reviewed and rejected all of Spisak's sixty-four assignments of error, including his claim that "[j]ury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment" under the U.S. and Ohio Constitutions, and his claim that he was denied effective assistance of counsel during the mitigation phase of his trial. App. 113a-114a, 306a. As to Spisak's jury-instruction claim, the court found that it had already rejected the same argument in earlier cases. App. 306a. The court then concluded that Spisak's ineffective assistance claim was not well taken in light of numerous authorities, including *Strickland v. Washington*, 466 U.S. 668 (1984). App. 307a.

Spisak's convictions became final on March 6, 1989, when this Court denied certiorari review of the

Ohio Supreme Court's decision. See *Spisak v. Ohio*, 489 U.S. 1071 (1989).

D. The federal district court denied Spisak's habeas petition.

After unsuccessfully seeking state post-conviction relief, App. 116a, 130a, Spisak filed a petition for writ of habeas corpus. The district court denied Spisak relief on all of his thirty-three grounds, including his challenges to the sentencing-phase jury instructions and counsel's performance during sentencing. App. 299a.

The district court first rejected Spisak's challenge to the sentencing-phase jury instructions. Spisak argued that the trial court erred by instructing the jury that its sentence must be unanimous but failing to explain the consequences of the jury's inability to reach unanimity. App. 183a-188a. But the district court found that argument precluded by *Jones v. United States*, 527 U.S. 373, 381-82 (1999), which held that a trial court's failure to instruct on the consequence of jury deadlock does not give rise to a cognizable constitutional claim. App. 187a.

The district court further noted the possible applicability of the Sixth Circuit's decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which applied *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), to grant habeas relief. In *Davis*, the Sixth Circuit held that an instruction requiring a capital jury to "first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and

runs afoul of *Mills*." 318 F.3d at 689. Observing that *Davis* conflicted with other Sixth Circuit decisions holding that similar instructions did not violate the Eighth Amendment, the district court declined to address whether Spisak's sentence was unconstitutional in light of *Davis*, in view of Spisak's failure to allege specifically that the instructions in his case precluded the jury from considering mitigating evidence. App. 188a-189a.

The district court next rejected Spisak's claim that counsel's closing argument was constitutionally ineffective, finding that counsel's alleged errors "can easily be attributed to a trial strategy." App. 199a. Specifically, the court found that defense counsel's challenged statements were part of a strategy to ingratiate himself with the jury, to blunt the prosecutor's depiction of the murders, and to show that Spisak's mental defect was a mitigating factor. App. 199a-201a. Finally, the district court concluded that "[e]ven assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior," because there is no reasonable probability that the jury would have reached a different sentence had counsel portrayed Spisak with more sympathy, given the "heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of the evidence." App. 203a-204a.

E. The Sixth Circuit reversed the district court and vacated Spisak's sentence.

The Sixth Circuit reversed the district court and granted habeas corpus relief, vacating Spisak's death sentence. The court first concluded that the jury's sentencing instructions were improper under *Davis*,

318 F.3d at 689–90, because they did not explicitly tell jurors that they need not find mitigating factors unanimously, they required that all twelve jurors sign the sentencing verdict form, and they did not inform jurors that the jurors need not unanimously reject a death sentence before imposing a life sentence. App. 71a-76a.

The Sixth Circuit also found that counsel was constitutionally ineffective during closing argument because he abandoned his duty of loyalty to Spisak by making only a "limited effort" to argue for a life sentence, by "rambling" on irrelevant matters, by suggesting that a verdict of death would be acceptable to the defense, and by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." App. 62a-64a. The Sixth Circuit also stated, in one sentence, that counsel's closing statements were prejudicial: "Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ." App. 67a.

F. After this Court granted the Warden's petition, vacated the Sixth Circuit's judgment, and remanded the case, the Sixth Circuit reinstated its original opinion.

The Warden filed a petition for writ of certiorari. The Court granted the petition, vacated the Sixth Circuit's judgment, and remanded the case for further consideration in light of *Musladin* and *Landrigan*. *Hudson v. Spisak*, 128 S. Ct. 373 (2007). Without further briefing by the parties, the Sixth

Circuit issued a four-page order reinstating its previous opinion. App. 12a. After the Warden filed a petition for rehearing and suggestion for rehearing en banc, the court issued an amended order that again reinstated its original opinion. App. 2a. The Sixth Circuit later denied en banc review. App. 1a.

REASONS FOR GRANTING THE WRIT

The Court should grant the Warden's petition and reverse the Sixth Circuit's judgment for two reasons. First, the Sixth Circuit ignored AEDPA's constraints, as well as this Court's instruction to apply *Musladin* on remand, when it granted habeas relief based on allegedly defective jury instructions that were not addressed or even presented in *Mills v. Maryland*. That error further amplified the existing division of authority on the question of proper jury instructions under *Mills*. Second, the Sixth Circuit improperly indulged a presumption of prejudice when it accepted Spisak's allegation that trial counsel was constitutionally ineffective during his closing argument, disregarding clear directives from this Court that habeas petitioners show actual prejudice when challenging a discrete decision or act of counsel. In doing so, the Sixth Circuit failed to afford proper deference to the Ohio Supreme Court's reasonable rejection of Spisak's claim under *Strickland*.

A. The Sixth Circuit applied its own interpretation of *Mills*—rather than clearly established federal law—and failed to apply AEDPA deference to the state court decisions, contributing to a division of authority on the jury instruction issue.

AEDPA dictates that an application for a writ of habeas corpus shall not be granted "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In *Musladin*, the Court explained that a state court's adjudication is not contrary to or an unreasonable application of clearly established federal law where this Court has never addressed the type of claim presented and the lower courts have diverged in their treatment of the claim. See 127 S. Ct. at 654; see also *Landigran*, 127 S. Ct. at 1942 (reversing the Ninth Circuit's application of AEDPA because the Court had "never addressed a situation like this"). Where this Court's cases give no clear answer to the question presented, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" *Musladin*, 127 S. Ct. 649 (quoting 28 U.S.C. § 2254(d)(1)).

After this Court vacated the Sixth Circuit's judgment and remanded the case for further consideration in light of *Musladin* and *Landigran*, App. 21a, the Sixth Circuit ignored the Court's

directive and again misapplied *Mills* to grant habeas relief on Spisak's "unanimity" and "acquittal-first" instruction claims. See App. 4a. This decision was incorrect for two reasons: First, the court failed to apply clearly established federal law and instead expanded this Court's holding in *Mills*. Second, the courts are divided on the application of *Mills*—indeed, even the Sixth Circuit itself has issued conflicting rulings—and this division demonstrates not only that the Sixth Circuit's application of *Mills* is not "clearly established Federal law," but also that the issue warrants this Court's review.

1. The Sixth Circuit extended *Mills* to a situation that *Mills* did not address.

Mills v. Maryland does not apply to jury instructions that require unanimity in the ultimate determination of whether aggravating factors outweigh mitigating factors. In *Mills*, the Court established that a jury sentencing instruction in a capital case is unconstitutional if it leads a reasonable juror to believe that any mitigating factors not found unanimously must be ignored when the individual juror casts his or her ultimate sentencing vote. 486 U.S. at 384. The Court further noted that a unanimity-in-mitigation-findings requirement could result in an absurd and troubling outcome if, for example, all the jurors agree that some mitigating factors exist and that a life sentence is appropriate, but fail to agree on any specific mitigating factor. In such a case, twelve jurors favoring a life sentence would have to ignore all the mitigating factors in their final vote, and thus return a death sentence, simply because they disagreed on

precisely which mitigating factors were present. *Id.* at 374.

This case differs starkly from the *Mills* scenario. The jury instructions at Spisak's penalty phase simply required juror unanimity in the ultimate determination of whether aggravating factors found beyond a reasonable doubt outweighed any mitigating factors. The trial court instructed the jury that if "all twelve members of the jury [found] by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweigh[ed] the mitigating factors," then it was required to "recommend to the Court that a sentence of death be imposed upon the defendant," but that if the jury found "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] ha[d] been found guilty of committing in the separate counts outweigh[ed] the mitigating factors," then it should impose one of two life sentences. App. 324a. Unlike the *Mills* jury, see 486 U.S. at 378, Spisak's jury was never instructed that it must determine unanimously whether or not a particular mitigating factor had been shown. The Sixth Circuit thus failed to recognize the significant distinction between a jury instruction that requires unanimity in *specific mitigation findings* and an instruction that simply requires unanimity in the *ultimate outcome*.

Ignoring this critical distinction, the Sixth Circuit attempted to wedge Spisak's case into the *Mills* paradigm based on three theories, none of which *Mills* addressed. First, the court found that an instruction requiring unanimity on the ultimate balance of aggravating versus mitigating factors

improperly implies a unanimity requirement as to the presence or absence of specific individual mitigating factors. The instruction here, however, required only that the jury agree unanimously that the aggravating factors outweighed the mitigating factors, see App. 323a—a requirement fully consistent with this Court's case law. The Sixth Circuit contorted that straightforward instruction, citing its fear that the jury misunderstood the instruction to require unanimous agreement on specific mitigating factors. But no reasonable jury would understand the sentencing instruction here to mean that a jury must unanimously agree on a mitigating factor before a juror could consider it. More to the point, *Mills* did not cast doubt on the appropriateness of such an instruction.

Second, the Sixth Circuit found that a verdict form requiring twelve signatures—unanimity, in other words—on the ultimate sentence also improperly implies that the jurors must unanimously agree on mitigating factors. But the sentencing verdict form in this case differs markedly from the problematic verdict form in *Mills*. In *Mills*, the jurors were required to render a yes-or-no answer as to each potential mitigating factor, and all twelve jurors were required to sign the form. *Mills*, 486 U.S. at 378-79. Here, by contrast, the jurors were simply required to indicate by signature whether the aggravating factors ultimately outweighed any mitigating factors. App. 325a. Given that a unanimous sentencing verdict is in no way erroneous, it follows that the verdict form may require the signatures of the twelve jurors to reflect a unanimous verdict.

Third, the Sixth Circuit created a new rule not contemplated by *Mills* when it found constitutional error in so-called "acquittal-first" sentencing instructions—that is, sentencing instructions that suggest a jury must unanimously acquit the defendant of death before it may impose a life sentence. The court's reasoning rested on the Sixth Circuit's earlier decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). In *Davis*, the court observed that, under Ohio law, a deadlocked jury need not reach unanimity on the death penalty, but instead may proceed to return a unanimous noncapital sentence. *Id.* at 689 (citing *Ohio v. Brooks*, 661 N.E.2d 1030 (Ohio 1996)). The court then stated, without citation, that such a "non-unanimous mechanism" for preventing a death sentence was "constitutionally required," *Davis*, 318 F.3d at 689. The *Davis* court next stated, again without citation or explanation, that an "instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." *Id.* The Sixth Circuit panel in this case echoed *Davis*'s unsupported conclusion, stating that Spisak's so-called "acquittal-first" instruction "impermissibly imposed a unanimity requirement on the jury's ability to find mitigating factors in violation of . . . *Mills* and *McKoy*." App. 4a.[1]

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[1] The Sixth Circuit further erred under AEDPA by relying on *McKoy v. North Carolina*, 494 U.S. 433 (1990), because this Court decided *McKoy* after Spisak's conviction became final. See *Williams v. Taylor*, 529 U.S. 362 (2000) ("The threshold question under AEDPA is whether [the petitioner] seeks to

Two fundamental flaws inhere in that reasoning. First, even if the Sixth Circuit correctly read Spisak's jury instruction as an "acquittal-first" instruction—a doubtful proposition—its reading was based solely on Ohio law (*Davis*'s interpretation of *Brooks*), not federal constitutional law. In other words, even if an instruction requiring the jury to accept or reject the death penalty before moving on to other possible sentences were improper under Ohio law, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

Moreover, regardless of what Ohio law says on the matter, an "acquittal-first" instruction does not fall within the contours of *Mills*, and thus the Sixth Circuit *extended*, rather than applied, this Court's case law. *Mills* applies "fairly narrowly" to its unusual circumstances. *Beard v. Banks*, 542 U.S. 406, 420 (2004). The jurors in *Mills* were required to make what amounted to unanimous special findings that a particular mitigating factor existed before they weighed, in a second stage, the aggravating factors against the mitigating factors that they had found. That unique procedure was all the more problematic because it apparently resulted in the jurors' complete failure to conduct the required weighing process. *Mills*, 486 U.S. at 380 n.13. Here, by contrast, the jurors were instructed to deliberate on the balance of mitigating and aggravating circumstances to reach a consensus on the outcome of that balance. In that weighing process, each juror

---

apply a rule of law that was clearly established at the time his state-court conviction became final.").

by definition gave weight to mitigating evidence and performed the very type of individual analysis that *Mills* is designed to protect.

2. Given the lack of clear guidance from this Court, the lower courts are divided on the jury instruction issue.

The Sixth Circuit should not have granted habeas relief on Spisak's jury instruction claim, because this Court has never spoken clearly on the issue. Indeed, that lack of clear guidance is why this Court vacated and remanded the Sixth Circuit's original opinion in light of *Musladin*. See 127 S. Ct. at 654 ("Given the lack of holdings from this Court . . . it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (citing § 2254(d)(1) (alteration in original)). The courts of appeals are now divided on the issue, and that division of authority further warrants this Court's review.

Other circuits—and even other Sixth Circuit panels—have reached the opposite outcome by declining to interpret or apply *Mills* to prohibit the type of instructions that the court below found constitutionally defective. The Tenth Circuit, for instance, examined a claim nearly identical to Spisak's: The petitioner argued that an instruction that expressly required unanimity in some respects but remained silent on the need for unanimity when considering mitigating factors "'erroneously implied that the jury was required to find a mitigating circumstance unanimously before each juror could consider the mitigating circumstance.'" *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999) (quoting *Duvall v. Reynolds*, 139 F.3d 768, 791-92 (10th Cir.

1998)). In rejecting the petitioner's claim, the Tenth Circuit reaffirmed that "a trial court need not . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *Id.* Other courts have reached the same conclusion. See *Powell v. Bowersox*, 112 F.3d 966, 970-71 (8th Cir. 1997) (finding no *Mills* violation where "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist"); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (finding no *Mills* violation where instruction required unanimous finding on aggravating factors but no unanimous instruction on mitigating factors); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same).

The Third Circuit, for its part, is internally divided on the issue. One panel found no *Mills* violation when it considered instructions nearly identical to those here. See *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3d Cir. 1991). A different panel, however, recently departed from *Zettlemoyer* and found that an instruction must affirmatively clarify that the jury must be unanimous as to aggravating, but not mitigating, factors. See *Abu-Jamal v. Horn*, 520 F.3d 272, 303-04 (3d Cir. 2008). The Commonwealth of Pennsylvania has filed a petition for certiorari with this Court seeking review of that decision. See Petition for Writ of Certiorari, *Beard v. Abu-Jamal*, No. 08-652 (U.S. Nov. 14, 2008).

Even the Sixth Circuit's application of its own precedent has been inconsistent. Jury instructions like those at issue here were originally upheld by in

cases such as *Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998), and *Henderson v. Collins*, 262 F.3d 615, 621-22 (6th Cir. 2001), before more recent precedent created inconsistency and obscurity in the governing law. See, e.g., *Scott v. Mitchell*, 209 F.3d 854, 876-77 (6th Cir. 2000). The Sixth Circuit has acknowledged the confusion among its own opinions, see, e.g., *id.*; *Williams v. Anderson*, 460 F.3d 789, 810-13 (2006), as did the district court in this case, see App. 189a.

Additionally, the Sixth Circuit's prohibition of so-called "acquittal-first" sentencing instructions is unparalleled in any other circuit. Indeed, the only federal courts outside the Sixth Circuit to use the phrase have applied it to guilt-phase instructions that require rejection of a greater offense before consideration of a lesser-included offense, and these courts have found that a trial court may give an acquittal-first guilt-phase instruction without running afoul of the Constitution, particularly if the defendant does not object. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978). To the extent that Spisak's "acquittal-first" complaint is actually a request for affirmative instructions regarding the consequence of a jury's failure to agree on the death penalty, the opinion below conflicts with numerous other circuits that properly apply the Court's decision in *Jones v. United States*, 527 U.S. 373, 381-82 (1999), which prohibits habeas relief based on the absence of a juror-deadlock instruction. See, e.g., *Lyons v. Lee*, 316 F.3d 528, 535 n.8 (4th Cir. 2003); *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993);

Zettlemoyer, 923 F.2d at 309. In light of this conflict, this Court should grant review.

B. The Sixth Circuit misapplied settled law and ignored AEDPA when it applied *Cronic*, and not *Strickland*, to Spisak's ineffective assistance claim.

Allegations of ineffective assistance of counsel are reviewed under the familiar two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the habeas petitioner must show that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In rare circumstances, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," courts will presume that the petitioner has suffered prejudice and excuse him from the second requirement. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

Spisak's allegations of ineffective assistance focus not on the totality of trial counsel's preparation and performance, but on one discrete portion of the trial—statements made by trial counsel during his closing argument. Although this Court has affirmed, in no uncertain terms, that *Strickland*'s two-part test governs review of such claims, the Sixth Circuit instead applied its own circuit precedent (which in turn rested squarely on *Cronic*) to presume that trial counsel's performance prejudiced Spisak. When the correct standard is applied, it is clear that the Ohio Supreme Court's rejection of Spisak's claim was reasonable under AEDPA. This Court should grant

review to correct the Sixth Circuit's unwarranted expansion of *Cronic*.

1. Allegations of ineffective assistance at specific points in the trial proceeding are governed by *Strickland*.

Although the Sixth Circuit paid lip service to *Strickland*, the court in fact indulged in a presumption of prejudice that contradicts this Court's case law. The appeals court first held that trial counsel's closing argument was deficient: Counsel offered an "extremely graphic and overly descriptive recounting of Defendant's crimes," told the jury of Spisak's "sick twisted mind" and his associations with Nazis, reminded the jury that Spisak had no good deeds or thoughts, and undertook only a "limited effort" to stress evidence of Spisak's mental illness. App. 64a-65a. The court then found that "trial counsel's hostility toward [Spisak] aligned counsel with the prosecution against his client." App. 66a. Finally, the court analogized Spisak's case to *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997), where the Sixth Circuit applied "the *Cronic presumption* of prejudice" after determining that trial counsel's "performance was so egregious as to amount to the virtual or constructive denial of the assistance of counsel." *Id.* at 1156. Without any analysis of *Strickland*'s prejudice prong, the court concluded: "Absent trial counsel's behavior during the closing argument of the mitigating phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ." App. 67a.

The Sixth Circuit's analysis disregards *Cronic*'s clear holding. The *Cronic* Court identified three exceptions to *Strickland*'s prejudice requirement: (1) where a "complete denial of counsel" occurs at "a critical stage of [the] trial," 466 U.S. at 659; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *id.*; or (3) where "the surrounding circumstances ma[k]e it . . . unlikely that any lawyer could provide effective assistance." *Id.* at 661. The first and third exceptions are not relevant here; counsel was present for the entire proceeding and no external circumstances constrained his advocacy. The question, then, is whether counsel's performance—even assuming it was deficient—triggered *Cronic*'s second exception.

Cronic's second exception does not apply because the allegedly deficient performance occurred at a single point—during the penalty-phase closing argument—not throughout the entire trial proceeding. *Bell v. Cone*, 535 U.S. 685 (2002), is illustrative. There, defense counsel completed four tasks on behalf of his client, Gary Bradford Cone, during the penalty phase of a capital murder trial: (1) he asked the jury for mercy during his brief opening statement; (2) he referenced evidence that Cone suffered from Vietnam Veterans Syndrome; (3) during cross examination, he elicited the fact that Cone had received the Bronze Star; and (4) he successfully objected to the introduction of two photographs of the murder victims. *Id.* at 708 (Stevens, J., dissenting). Counsel did not interview a number of character witnesses who would have testified that Cone did not engage in any criminal behavior before leaving for Vietnam. *Id.* Nor did

counsel present the mitigation evidence he did have—testimony from Cone's family members and medical experts, the facts and circumstances of Cone's Bronze Star, or a letter of forgiveness from the victim's sister. *Id.* at 709-10. Rather, he rested without *any* mitigation presentation or closing argument. *Id.* at 713.

When assessing Cone's claim of ineffective assistance, the Court rejected calls to presume prejudice: "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said, 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* at 696-97 (quoting *Cronic*, 466 U.S. at 659). It then observed that Cone had argued "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points." *Id.* at 697. The Court therefore concluded that Cone's claim of ineffective assistance was governed by *Strickland*. *Id.* at 697-98.

After *Bell*, the courts of appeals, including the Sixth Circuit, have recognized that *Cronic* cannot be applied to discrete acts of alleged ineffectiveness by trial counsel. See, e.g., *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007) ("In the wake of *Bell*, courts have rarely applied *Cronic*, emphasizing that only non-representation, not poor representation, triggers a presumption of prejudice."); *Benge v. Johnson*, 474 F.3d 236, 247 (6th Cir. 2007) ("[T]he *Cronic* presumption applies only where defense counsel *completely* or *entirely* fails to oppose the prosecution

throughout the guilt or penalty phase *as a whole*."); *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006) (noting that trial counsel's limited efforts—his cross examination of government witnesses, suggestion of some defense themes, and introduction of several exhibits—was "minimal performance . . . sufficient to remove this case from *Cronic*'s ambit"); *Freeman v. Graves*, 317 F.3d 898, 900 (8th Cir. 2003) ("The defendant must assert counsel failed to oppose the prosecution throughout the proceeding as a whole, rather than at specific points."); *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("*Cronic* is reserved only for those extreme cases in which counsel fails to present any defense.").

Under this established framework, Spisak cannot claim a presumption of prejudice from his counsel's allegedly deficient performance. No dispute exists as to the adequacy of counsel's representation aside from the closing argument. The Sixth Circuit rejected Spisak's argument that counsel performed an inadequate mitigation investigation, finding that counsel had collected "an extensive social history." App. 68a. Further, counsel presented that history—Spisak's difficult and isolated childhood, his gender confusion, and his pursuit of a sex change operation—to the jury. App. 68a-69a. Finally, counsel could not realistically challenge the aggravating circumstances of Spisak's three murders and two attempted murders at the penalty-phase hearing. His client confessed to them, admitting that they were unprovoked acts of violence. App. 364a-368a, 388a-396a. Because Spisak's claim turns entirely on what "his counsel failed to do . . . at specific points" in the trial—specifically, during the closing argument—Spisak

must establish an entitlement to relief under *Strickland*. *Bell*, 535 U.S. at 697.

2. The Sixth Circuit's contrary conclusion was not based on clearly established federal law in effect at the time of the state court decision.

In granting relief to Spisak, the Sixth Circuit jettisoned *Strickland*, invoking its earlier decision in *Rickman v. Bell* to presume prejudice and grant relief. This approach was flawed for several reasons.

As a threshold matter, the court ignored AEDPA. Under 28 U.S.C. § 2254(d)(1), habeas relief can be granted based only on "the holdings . . . of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. *Rickman* was neither a decision of this Court nor established law when the Ohio Supreme Court rejected Spisak's ineffective-assistance claim. In 1988, the only relevant cases on the books were *Cronic* and *Strickland*. And the Ohio Supreme Court's decision to deny relief under *Strickland*, see App. 307a, was neither contrary to nor an unreasonable application of those precedents. As explained above, Spisak did not allege, nor did the Sixth Circuit find, that his "counsel *entirely* fail[ed] to subject the prosecution's case to meaningful adversarial testing" during the penalty phase. *Cronic*, 466 U.S. at 659 (emphasis added).

Moreover, the facts of *Rickman* distinguish it from Spisak's case. In *Rickman*, trial counsel did not undertake any investigation or meaningful preparation for the guilt phase of the trial. 131 F.3d at 1157. Then, at the penalty phase, counsel elicited

damaging testimony from his own witnesses—suggestions that his client planned the murder despite contrary evidence in the record, information that his client possessed a hand grenade detonator, and statements that his client expressed an intent to commit unrelated crimes. *Id.* at 1158. Further, during his witness examinations, trial counsel portrayed his client as crazed and dangerous—that he was "nuts," that he had "a wild, glassy look in his eyes," and that he "just got out of somebody's insane asylum." *Id.* at 1158-59. Finally, during closing argument, counsel indicated that he personally suffered "guilt by association" with his client, that his client was as "wild as a March hare," and that "[h]e may take off after me in a minute." *Id.* at 1159.

The Sixth Circuit presumed prejudice under *Cronic*, noting that "these outrageous tactics were introduced by [trial counsel] himself," that the portrayal was "even more frightening than the prosecution could paint," that these tactics "were employed during both the guilt and the sentencing phases," and that counsel had "express[ed] personal sympathy for the prosecution and shame from representing Rickman" during his closing argument. *Id.* at 1159-60. In sum, defense counsel had "aligned himself with the prosecution" throughout the entire proceeding. *Id.* at 1159.

The claimed deficiencies in trial counsel's performance here are different in kind. The Sixth Circuit held that counsel's investigation was adequate, and Spisak does not challenge any part of counsel's advocacy during the guilt phase. With respect to the closing argument, the allegedly damaging content cited by the Sixth Circuit is

confined to a nine-page section of the forty-five-page transcript. See App. 334a-339a. Unlike *Rickman*, it is undisputed that the vast majority of Spisak's trial proceedings retained an adversarial nature.

Because Spisak challenges a single, discrete act of trial counsel's conduct during the proceedings, he cannot claim a presumption of prejudice under *Cronic*. Instead he must show actual prejudice. And on that score, the Ohio Supreme Court's decision to apply *Strickland* to Spisak's claim warrants deference.

3. The Ohio Supreme Court's rejection of Spisak's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland*.

Under 28 U.S.C. § 2254(d)(1), "it is not enough to convince a federal habeas court that, in its independent judgment, the state court decision applied *Strickland* incorrectly. Rather, he must show that [the state court] applied Strickland to the facts of his case in an objectively unreasonable manner." *Bell*, 535 U.S. at 699 (internal citation omitted). Had the Sixth Circuit applied Strickland instead of *Cronic* to this case, it would have recognized that the Ohio Supreme Court acted reasonably when it rejected Spisak's claim of ineffective assistance.

a. Spisak cannot establish deficient performance.

In finding that counsel was constitutionally deficient during closing argument, the Sixth Circuit focused on four of his decisions: (1) his overly

graphic description of Spisak's crimes; (2) his recounting of Spisak's philosophical association with the Nazi party and his "sick twisted mind"; (3) his concession that Spisak did not deserve sympathy based on his "good deeds" or "good thoughts" because he had none; and (4) his failure to make an express plea that the jury return a verdict of life. App. 64a-65a. None of these decisions was an objectively unreasonable trial tactic. As this Court has explained, "counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam).

With respect to the first three alleged deficiencies, counsel made a strategic decision to concede certain facts about his client's character, his background, and the brutality of his criminal acts. The jury had heard testimony from the investigating police officer that Spisak readily volunteered information about his role in the murders and attempted murders. App. 364a-368a. And when Spisak took the stand, he proudly testified to his association with the American Nazi Party and his spiritual identification with Hitler. App. 374a-380a. Spisak then blamed Jews for "control[ling] all the thoughts of public opinion" and blacks for "breeding at a rate that will soon make the white people extinct," App. 383a-384a, and commented that "[t]he force of God" motivated him to "take up arms." App. 386a.

Finally, Spisak openly described his thoughts, actions, and motives in committing each of the murders and attempted murders. App. 388a-396a. Without any hint of remorse, he expressed personal pride in giving this testimony: "We need somebody to get up here and take the stand and give a reasonable logical concise explanation for those things which must be done and this has not been done until now." App. 393a. Spisak also testified that, given the chance, he would "continue the war [he] started" by "inflict[ing] the maximum amount of damage on the enemies"—specifically, "Blacks and Jews." App. 397a.

During his closing argument, trial counsel could neither challenge nor ignore his client's damaging admissions or self-portrayal before the jury. His decision to recognize and concede certain aggravating factors was not, given these circumstances, an unreasonable choice. See *Yarborough*, 540 U.S. at 9 ("By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case.").

With respect to the fourth alleged deficiency, the Sixth Circuit found that counsel's failure to ask the jury to return a life sentence was "[m]ost shocking of all." App. 65a. Yet, in *Yarborough*, the defense attorney also failed to request a life sentence during his closing argument. This Court found no deficient performance, emphasizing that "a low-key strategy that stresses the jury's autonomy is not unreasonable." 540 U.S. at 10.

b. Spisak cannot establish prejudice.

Even if trial counsel's closing argument were constitutionally deficient, Spisak cannot show prejudice—that is, he cannot establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Nor can Spisak show that it was objectively unreasonable for the Ohio Supreme Court to reach that conclusion.

As discussed above, the depraved nature of Spisak's crimes and thoughts was graphically displayed to the jury through the guilt-phase evidence, the investigating officer's testimony, and Spisak's own unvarnished statements while on the stand. That trial counsel lent his credence to this aggravating evidence during his closing argument does not establish prejudice, because the jury would have accepted the evidence anyway. It was neither contested nor, given Spisak's own testimony, contestable.

Moreover, the Sixth Circuit recognized that the list of promising mitigation themes for Spisak was short: "The best chance of mitigation available was in fact the evidence that Defendant was, to some degree, mentally ill." App. 69a. It then found that trial counsel's investigation and presentation of the mental-illness theme during the penalty phase was adequate; he offered "extensive evidence of Defendant's severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation." *Id.*

Trial counsel's closing argument further pressed the mental-illness theme. Using the metaphor of

three different-sized jars, counsel argued that, although insufficient to establish legal incompetence or insanity, the defense's evidence was sufficient for the jury to conclude that Spisak was impaired by mental illness and that this illness outweighed the admittedly strong aggravating circumstances. App. 341a-354a. Counsel supported this argument with references to his medical experts' testimony. App. 342a-343a, 353a-354a.

All told, Spisak's "best chance of mitigation"—his claim of mental illness—was adequately presented and argued to the jury. Whether or not trial counsel was wise to recite the aggravating circumstances of the murders or the tortured beliefs of his client during closing argument is of little moment. Those facts were already in the record, and they would have been burned into the memory of any reasonable juror regardless of what trial counsel said. Accordingly, Spisak cannot show a reasonable probability that, but for his trial counsel's closing argument, the result of the proceeding would have been different.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 1, 2008

APPENDIX

Supreme Court, U.S.
FILED

08-724 DEC 1 - 2008

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

KEVIN SMITH, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 03-4034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR., *Petitioner-Appellant,*

v.

BETTY MITCHELL, Warden, *Respondent-Appellee.*

ORDER

Before: MARTIN, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

* Judge Cook recused herself from participation in this ruling.

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0149a.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR.,
Petitioner-Appellant,

v.

BETTY MITCHELL, Warden,
Respondent-Appellee.

No. 03-4034

Argued: April 11, 2008

Before: MARTIN, MOORE, and CLAY, Circuit Judges.

AMENDED ORDER

On October 20, 2006, this Court issued an opinion partially granting habeas relief to Petitioner, Frank G. Spisak, and ordering a new mitigation phase trial. *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006). Specifically, this Court found that Spisak received ineffective assistance of counsel and that

the jury instructions at the penalty phase of Spisak's trial unconstitutionally required the jury to be unanimous in its findings with respect to mitigating evidence. Respondent warden thereafter filed a petition for writ of certiorari with the United States Supreme Court. On October 9, 2007, the Supreme Court granted certiorari, vacated the judgment of this Court, and remanded the case to this Court for further consideration in light of *Carey v. Musladin*, 127 S.Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007). After careful review and consideration of *Musladin* and *Landrigan*, we find that neither of the cases require reversal of our prior disposition of this case. Accordingly, we reinstate our opinion of October 20, 2006, partially granting habeas relief and ordering a new mitigation phase trial.

In Spisak v. Mitchell, 465 F.3d 684 (6th Cir. 2006), this Court partially granted habeas relief to Petitioner on two grounds. First, this Court found that Petitioner was prejudiced by his counsel's deficient performance at the sentencing phase of Petitioner's trial inasmuch as counsel's closing argument focused almost entirely on the heinous nature of Petitioner's crimes and his deficient nature as a person. Defense counsel in no way attempted to rehabilitate Petitioner in the eyes of the jurors who would eventually have to decide whether to recommend the death penalty. There is no evidence in the record suggesting that Petitioner in any way contributed or consented to counsel's outrageous remarks during closing arguments. Relying on Supreme Court precedent applying the standard for ineffective assistance of counsel, this Court reasoned that defense counsel's conduct was so deficient, prejudicial and indeed, egregious, that it

"undermined the proper functioning of the adversarial process" such that "the trial cannot be relied upon as having produced the just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Second, this Court found that Ohio's so-called "acquittal first" instruction impermissibly limited the jury's evaluation of mitigating evidence in violation of the Eighth Amendment. Relying on *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990), we held that "[w]hile a trial court's sentencing phase instructions may require juror unanimity as to the results of the process of weighing aggravating circumstances and mitigating factors, the instructions cannot require unanimity as to the presence of a mitigating factor." *Spisak*, 465 F.3d at 708. At the sentencing phase of Petitioner's trial, the trial court instructed the jury that before a life sentence could be imposed, that it must find that the prosecution failed to prove that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The trial court did not instruct the jury, however, that such a finding need not be unanimous. Moreover, the verdict form given to the jury reflected a unanimity requirement with respect to the finding that the mitigating factors outweigh the aggravating factors inasmuch as the form required twelve signatures before the jury could impose a life sentence. This, we found, impermissibly imposed a unanimity requirement on the jury's ability to find mitigating factors in violation of federal law as announced in *Mills* and *McKoy*.

Based on these two grounds, we found that Petitioner's conviction resulted from an unreasonable application of federal law as announced by the

Supreme Court, and that Petitioner therefore overcame the high bar for habeas relief established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA");[1] consequently, we remanded for a new mitigation phase trial.

Upon review of *Musladin* and *Landrigan*, we find that they are readily distinguishable, and therefore Petitioner remains entitled to habeas relief as a result of the ineffective assistance of counsel at the mitigation phase of his trial and the "acquittal first" jury instruction.

In *Carey v. Musladin*, a habeas petitioner sought a writ of habeas corpus contending that he had been denied a fair trial after trial spectators wore buttons to the trial which displayed a picture of the murder victim. 127 S.Ct. at 651. A state court held that the display of buttons picturing the victim did not deny the defendant his right to a fair trial. *Id.* The Ninth Circuit Court of Appeals reversed, finding that the state court's decision was "contrary to or an unreasonable application of, clearly established federal law as determined by the Supreme Court." The Ninth Circuit applied *Estelle v. Williams*, 425 U.S. 501 (1976) (defendant forced to wear prison garb by the state denied right to a fair trial) and *Holbrook v. Flynn*, 475 U.S. 560 (1986) (finding that the seating of "four uniformed state

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[1] Under AEDPA, an application for a writ of habeas corpus will not be granted unless the prior state proceedings (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States;" or (2) involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

troopers" in spectators row immediately behind defendant constituted the denial of the right to a fair trial) to find that the spectators' conduct was so inherently prejudicial that it denied the defendant his right to a fair trial. *Id.* at 652. The Supreme Court reversed, noting that whether spectator conduct, as opposed to state sponsored courtroom practices, could violate a defendant's constitutional right to a fair trial was "an open question in our jurisprudence." *Id.* at 654. Indeed, at the time *Musladin* was decided, courts across the country held divergent views on the application of *Williams* and *Flynn* to spectator conduct. *Id.* (collecting cases). Consequently, the failure of the state court to extend *Williams* and *Flynn* to spectator conduct was not an "unreasonable application" of "clearly established" federal law. *Id.*

In our view, *Musladin* is readily distinguishable from *Spisak*. First, *Musladin* is factually inapposite. *Musladin* involved a habeas petition alleging an infringement on the right to a fair trial based upon spectator conduct whereas *Spisak* alleged constitutionally ineffective assistance of counsel as a result of counsel's arguments to the jury and an impermissible "acquittal first" instruction at the penalty phase of Petitioner's trial.

Second, unlike *Musladin*, our holdings in Spisak did not address an undeveloped area of the law; rather, this Court's holdings partially granting habeas relief relied on well-settled Supreme Court precedent regarding ineffective assistance of counsel at the sentencing phase of trials, i.e., *Strickland v. Washington*, 466 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003) and the prohibition against unanimity standards with respect to the

finding of mitigation factors, i.e., *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990). Federal law regarding ineffective assistance of counsel and penalty phase jury instructions of the kind addressed in *Spisak* was therefore "clearly established."

Third, the fact that the Supreme Court has not squarely addressed a situation involving a counsel's deficient performance during closing arguments of the mitigation phase of a trial or the specific type of instruction given here does not preclude this Court's finding that the state court unreasonably applied federal law. Indeed, as the Supreme Court recently noted in *Panetti v. Quarterman*, 551 U.S.–, 127 S. Ct. 2842 (2007), "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Id.* at 2858 (quoting *Musladin*, 127 S.Ct. at 656 (Kennedy, J., concurring)). Accordingly, we may find the application of a *principle* of federal law unreasonable despite the "involve[ment of] a set of facts 'different from those of the case in which the principle was announced.'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)); *see also Smith v. Patrick*, 508 F.3d 1256, 1259 (9th Cir. 2007) ("Habeas relief is appropriate under the 'unreasonable application' prong of section 2254(d)(1) when a state court violates the *principle* of clearly established federal law that has been determined by the Supreme Court . . . .") (emphasis original). Thus, this Court's holding in *Spisak* was consistent with the mandate of AEDPA that federal courts are not to disturb state court determinations unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by

the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In *Schriro v. Landrigan*, the Supreme Court considered whether a habeas petitioner presented a colorable claim of ineffective assistance of counsel. 127 S.Ct. at 1937. In *Landrigan*, the petitioner alleged that he received ineffective assistance of counsel after his lawyer failed to offer mitigating evidence at sentencing and did not adequately investigate mitigating evidence. *Id.* at 1938. The Supreme Court, however, disagreed. Applying the *Strickland* standard, the Court found that defense counsel's performance was neither deficient nor did it prejudice the petitioner. *Id.* at 1944. The Court found that the petitioner could not demonstrate that his counsel was deficient in failing to offer mitigating evidence at sentencing because the petitioner: (1) prohibited mitigation witnesses from testifying regarding his difficult upbringing and family history of substance abuse; (2) told the trial judge that no mitigating evidence existed; and (3) interfered with the presentation of mitigation evidence. *Id.* at 1941-42. The petitioner even told the sentencing court "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." *Id.* at 1943. Additionally, the Court found that the petitioner could not demonstrate prejudice as a result of defense counsel's failure to further investigate mitigating evidence. The Court noted that the mitigating evidence that would have been discovered was "weak" in comparison to the overwhelming aggravating evidence and duplicative of the evidence that the petitioner had instructed counsel not to introduce regarding his family history. *Id.* at 1944. Consequently, the petitioner was denied habeas relief as he could not make out a colorable claim of

ineffective assistance of counsel.

In *Spisak*, however, the story is quite different. Unlike *Landrigan*, Defense counsel in Spisak was clearly deficient inasmuch as he described Petitioner as "undeserving of sympathy" and "demented." The evidence on the record demonstrates that counsel "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. For example, during his closing argument at the mitigation phase of trial, counsel engaged in a "graphic and overly descriptive recounting of Defendant's crimes . . . ." *Spisak*, 465 F.3d at 705. Unlike *Landrigan*, there is no evidence that Petitioner consented to this line of argumentation or prevented counsel from presenting a more persuasive case for leniency. Rather, it appears that counsel independently pursued this course of conduct and left Petitioner to suffer the consequences of the prejudicial remarks. Indeed, the prejudice that occurred in this case is quite stark. Certainly, it is one thing not to introduce mitigating evidence as in *Landrigan*, but it is quite another to lend credence to the aggravating evidence presented by the prosecution by essentially describing one's own client as a monster. We remain convinced that had Spisak's counsel not demonized Spisak in his arguments to the jury, there is a reasonable probability that at least one juror would have had a different opinion of the proper outcome in this case.

For the reasons stated above, we reinstate our previous opinion in this matter, *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), and remand Petitioner's case to the district court for further proceedings consistent with our previous disposition.

IT IS SO ORDERED.

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I concur in the majority order reinstating the opinion of October 20, 2006, but again dissent as to Issue 1 and reinstate my prior opinion as well. In *Panetti v. Quarterman*, 551 U.S. –, 127 S. Ct. 2842 (2007), the Supreme Court clarified its holdings in *Schriro v. Landrigan*, 550 U.S.–, 127 S. Ct. 1933 (2007), and *Carey v. Musladin*, 549 U.S. –, 127 S. Ct. 649 (2006). *Panetti* solidifies my position in this case by clearly stating that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti*, 127 S. Ct. at 2858 (quoting *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring)). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). A recent Ninth Circuit decision (generated after the Supreme Court vacated and remanded a case for it to address the effect (if any) of *Musladin*) noted, after citing *Panetti*, that "[h]abeas relief is appropriate under the 'unreasonable application' prong of section 2254(d)(1) when a state court violates the principle of clearly-established federal law that has been determined by the Supreme Court." *Smith v. Patrick*, 503 F.3d 1256, 1259 (9th Cir. 2007) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). The constitutional principles derived from *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), not their specific facts, remain key in this case. Because Spisak's entire defense centered on

his alleged insanity, the Supreme Court of Ohio's decision not to allow evidence critical to this defense (and its refusal to submit the insanity defense to the jury) violated his right, clearly established in *Chambers* and *Crane*, to present evidence essential to his defense. Therefore, once again, I respectfully dissent from the majority's treatment of Spisak's insanity defense, and I reinstate my dissent.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0017p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR.,
Petitioner-Appellant,

v.

BETTY MITCHELL, Warden,
Respondent-Appellee.

No. 03-4034

Argued: January 11, 2008

Before: MARTIN, MOORE, and CLAY, Circuit Judges.

ORDER

On October 20, 2006, this Court issued an opinion partially granting habeas relief to Petitioner, Frank G. Spisak, and ordering a new mitigation phase trial. *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006). Respondent warden thereafter filed a

petition for writ of certiorari with the United States Supreme Court. On October 9, 2007, the Supreme Court granted certiorari, vacated the judgment of this Court, and remanded the case to this Court for further consideration in light of *Carey v. Musladin*, 127 S.Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007). After careful review and consideration of *Musladin* and *Landrigan*, we find that neither of the cases require reversal of our prior disposition of this case. Accordingly, we reinstate our opinion of October 20, 2006, partially granting habeas relief and ordering a new mitigation phase trial.

In *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), this Court found that Petitioner presented a valid claim of ineffective assistance of counsel entitling him to habeas relief. In particular, this Court found that Petitioner was prejudiced by his counsel's deficient performance at the sentencing phase of Petitioner's trial inasmuch as counsel's closing argument focused almost entirely on the heinous nature of Petitioner's crimes and his deficient nature as a person. Defense counsel in no way attempted to rehabilitate Petitioner in the eyes of the jurors who would eventually have to decide whether to recommend the death penalty. There is no evidence in the record suggesting that Petitioner in any way contributed or consented to counsel's outrageous remarks during closing arguments. Relying on Supreme Court precedent applying the standard for ineffective assistance of counsel, this Court reasoned that defense counsel's conduct was so deficient, prejudicial and indeed, egregious, that it overcame the high bar for habeas relief established by the Antiterrorism and Effective Death Penalty

Act of 1996 ("AEDPA");[1] consequently, we remanded for a new mitigation phase trial.

Upon review of *Musladin* and *Landrigan*, we find that they are readily distinguishable, and therefore Petitioner remains entitled to habeas relief as a result of the ineffective assistance of counsel at the mitigation phase of his trial.

In *Carey v. Musladin*, a habeas petitioner sought a writ of habeas corpus contending that he had been denied a fair trial after trial spectators wore buttons to the trial which displayed a picture of the murder victim. 127 S.Ct. at 651. A state court held that the display of buttons picturing the victim did not deny the defendant his right to a fair trial. *Id.* The Ninth Circuit Court of Appeals reversed, finding that the state court's decision was "contrary to or an unreasonable application of, clearly established federal law as determined by the Supreme Court." The Ninth Circuit applied *Estelle v. Williams*, 425 U.S. 501 (1976) (defendant forced to wear prison garb by the state denied right to a fair trial) and *Holbrook v. Flynn*, 475 U.S. 560 (1986) (finding that the seating of "four uniformed state troopers" in spectators row immediately behind defendant constituted the denial of the right to a fair trial) to find that the spectators' conduct was so inherently prejudicial that it denied the defendant

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[1] Under AEDPA, an application for a writ of habeas corpus will not be granted unless the prior state proceedings (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States;" or (2) involved "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

his right to a fair trial. *Id.* at 652. The Supreme Court reversed, noting that whether spectator conduct, as opposed to state sponsored courtroom practices, could violate a defendant's constitutional right to a fair trial was "an open question in our jurisprudence." *Id.* at 654. Indeed, at the time *Musladin* was decided, courts across the country held divergent views on the application of *Williams* and *Flynn* to spectator conduct. *Id.* (collecting cases). Consequently, the failure of the state court to extend *Williams* and *Flynn* to spectator conduct was not an "unreasonable application" of "clearly established" federal law. *Id.*

In our view, *Musladin* is readily distinguishable from Spisak. First, *Musladin* is factually inapposite. *Musladin* involved a habeas petition alleging an infringement on the right to a fair trial based upon spectator conduct whereas *Spisak* alleged constitutionally ineffective assistance of counsel as a result of counsel's arguments to the jury.

Second, unlike *Musladin*, our holding in *Spisak* did not address an undeveloped area of the law; rather, this Court's holding partially granting habeas relief relied on well-settled Supreme Court precedent regarding ineffective assistance of counsel, i.e., *Strickland v. Washington*, 466 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003). The Supreme Court has been quite clear in applying precedent regarding ineffective assistance of counsel to the mitigation phase of trials. Federal law regarding ineffective assistance of counsel of the kind addressed in *Spisak* was therefore "clearly established."

Third, the fact that the Supreme Court has not squarely addressed a situation involving a counsel's deficient performance during closing arguments of the mitigation phase of a trial does not preclude this Court's finding that the state court unreasonably applied federal law as announced in *Strickland*. Indeed, as the Supreme Court recently noted in *Panetti v. Quarterman*, 551 U.S.–, 127 S. Ct. 2842 (2007), "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Id.* at 2858 (quoting *Musladin*, 127 S.Ct. at 656 (Kennedy, J., concurring)). Accordingly, we may find the application of a *principle* of federal law unreasonable despite the "involve[ment of] a set of facts 'different from those of the case in which the principle was announced.'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)); *see also Smith v. Patrick*, — F.3d —, 2007 WL 4233693, at *3 (9th Cir. 2007) ("Habeas relief is appropriate under the 'unreasonable application' prong of section 2254(d)(1) when a state court violates the *principle* of clearly established federal law that has been determined by the Supreme Court . . . .") (emphasis original). Thus, this Court's holding in *Spisak* was consistent with the mandate of AEDPA that federal courts are not to disturb state court determinations unless the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In *Schriro v. Landrigan*, the Supreme Court considered whether a habeas petitioner presented a colorable claim of ineffective assistance of counsel. 127 S.Ct. at 1937. In *Landrigan*, the petitioner alleged that he received ineffective assistance of

counsel after his lawyer failed to offer mitigating evidence at sentencing and did not adequately investigate mitigating evidence. *Id.* at 1938. The Supreme Court, however, disagreed. Applying the *Strickland* standard, the Court found that defense counsel's performance was neither deficient nor did it prejudice the petitioner. *Id.* at 1944. The Court found that the petitioner could not demonstrate that his counsel was deficient in failing to offer mitigating evidence at sentencing because the petitioner: (1) prohibited mitigation witnesses from testifying regarding his difficult upbringing and family history of substance abuse; (2) told the trial judge that no mitigating evidence existed; and (3) interfered with the presentation of mitigation evidence. *Id.* at 1941-42. The petitioner even told the sentencing court "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." *Id.* at 1943. Additionally, the Court found that the petitioner could not demonstrate prejudice as a result of defense counsel's failure to further investigate mitigating evidence. The Court noted that the mitigating evidence that would have been discovered was "weak" in comparison to the overwhelming aggravating evidence and duplicative of the evidence that the petitioner had instructed counsel not to introduce regarding his family history. *Id.* at 1944. Consequently, the petitioner was denied habeas relief as he could not make out a colorable claim of ineffective assistance of counsel.

In *Spisak*, however, the story is quite different. Unlike *Landrigan*, Defense counsel in Spisak was clearly deficient inasmuch as he described Petitioner as "undeserving of sympathy" and "demented." The evidence on the record demonstrates that counsel "was not functioning as

the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. For example, during his closing argument at the mitigation phase of trial, counsel engaged in a "graphic and overly descriptive recounting of Defendant's crimes . . . ." *Spisak*, 465 F.3d at 705. Unlike *Landrigan*, there is no evidence that Petitioner consented to this line of argumentation or prevented counsel from presenting a more persuasive case for leniency. Rather, it appears that counsel independently pursued this course of conduct and left Petitioner to suffer the consequences of the prejudicial remarks. Indeed, the prejudice that occurred in this case is quite stark. Certainly, it is one thing not to introduce mitigating evidence as in *Landrigan*, but it is quite another to lend credence to the aggravating evidence presented by the prosecution by essentially describing one's own client as a monster. We remain convinced that had Spisak's counsel not demonized Spisak in his arguments to the jury, there is a reasonable probability that at least one juror would have had a different opinion of the proper outcome in this case.

For the reasons stated above, we reinstate our previous opinion in this matter, *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), and remand Petitioner's case to the district court for further proceedings consistent with our previous disposition.

IT IS SO ORDERED.

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I concur in the majority order reinstating the opinion of October 20, 2006, but again dissent as to Issue 1 and reinstate my prior opinion as well. In *Panetti v.*

Quarterman, 551 U.S. –, 127 S. Ct. 2842 (2007), the Supreme Court clarified its holdings in *Schriro v. Landrigan*, 550 U.S. –, 127 S. Ct. 1933 (2007), and *Carey v. Musladin*, 549 U.S. –, 127 S. Ct. 649 (2006). *Panetti* solidifies my position in this case by clearly stating that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti*, 127 S. Ct. at 2858 (quoting *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring)). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003)). A recent Ninth Circuit decision (generated after the Supreme Court vacated and remanded a case for it to address the effect (if any) of *Musladin*) noted, after citing *Panetti*, that "[h]abeas relief is appropriate under the 'unreasonable application' prong of section 2254(d)(1) when a state court violates the principle of clearly-established federal law that has been determined by the Supreme Court." *Smith v. Patrick*, – F.3d –, No. 04-55831, 2007 WL 4233693, *3 (9th Cir. Dec. 4, 2007) (citing *Williams v. Taylor*, 529 U.S. 362 (2000)). The constitutional principles derived from *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), not their specific facts, remain key in this case. Because Spisak's entire defense centered on his alleged insanity, the Supreme Court of Ohio's decision not to allow evidence critical to this defense (and its refusal to submit the insanity defense to the jury) violated his right, clearly established in *Chambers* and i, to present evidence essential to his defense. Therefore, once again, I respectfully dissent from the majority's treatment of Spisak's insanity defense, and I

reinstate my dissent.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 06-1535

STUART HUDSON, WARDEN, *Petitioner*

v.

FRANK G. SPISAK, JR.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted. The judgment of the above court is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Carey v. Musladin*, 549 U.S. __ (2006), and *Schriro v. Landrigan*, 550 U.S. __ (2007).

October 9, 2007

Justice Stevens, Justice Ginsburg, and Justice Breyer would deny the petition for writ of certiorari.

APPENDIX E

No. 03-4034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR.,
Petitioner-Appellant

v.

BETTY MITCHELL, WARDEN,
Respondent-Appellee.

FILED
FEB 15 2007
LEONARD GREEN, Clerk

ORDER
BEFORE: MARTIN, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX F

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0388p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR.,
Petitioner-Appellant,

v.

BETTY MITCHELL, Warden,
Respondent-Appellee.

No. 03-4034

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 95-02675—Solomon Oliver, Jr., District Judge.

Argued: March 14, 2006

Decided and Filed: October 20, 2006

Before: MARTIN, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Alan C. Rossman, Cleveland, Ohio, for Appellant. Carol Ann Ellensohn, ATTORNEY

GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.
ON BRIEF: Alan C. Rossman, Cleveland, Ohio, Kreig J. Brusnahan, LAW OFFICES OF KREIG J. BRUSNAHAN, Avon Lake, Ohio, for Appellant. Carol Ann Ellensohn, Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

CLAY, J., delivered the opinion of the court, in which MARTIN, J., joined. MOORE, J. (pp. 28-30), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. This appeal is brought by death-sentenced Ohio prisoner, Frank G. Spisak, Jr., from the judgment of the district court dismissing Defendant's application for a § 2254 writ of habeas corpus. Defendant challenges his sentence and convictions on the following grounds: (I) that the trial court improperly struck the testimony and reports of expert witnesses and refused to submit Defendant's insanity defense to the jury; (II) his trial counsel rendered ineffective assistance during the mitigation phase of his trial; (III) the unanimity and "acquittal-first" jury instructions infringed Defendant's constitutional rights; (IV) there was a Clemons violation where the trial court upheld Defendant's death sentence after re-weighing the aggravating and mitigating circumstances; and (V) that there was prosecutorial misconduct during

various stages of the culpability and mitigation phases of the trial.

For the reasons set forth below, we **AFFIRM** in part and **REVERSE** in part. We **AFFIRM** the judgment of the district court as it relates to issues I, IV, and V, but we **REVERSE** the district court's judgment as to issues II and III, and **REMAND** with instructions to grant Defendant's petition as to these issues.

BACKGROUND

I. Procedural History

On March 29, 1983, the Cuyahoga County Grand Jury indicted Defendant Spisak on four counts of aggravated murder in violation of Ohio Rev. Code § 2903.01; three counts of aggravated robbery in violation of Ohio Rev. Code § 2911.01; one count of attempted murder in violation of Ohio Rev. Code § 2903.02; and one count of receiving stolen property in violation of Ohio Rev. Code § 2913.51. Pursuant to Ohio Rev. Code § 2929.04(A), the aggravated murder counts contained nineteen death penalty specifications.

Defendant pled not guilty by reason of insanity, claiming to be a follower of Adolf Hitler, as to all counts on April 8, 1983. Before trial, the court ordered Defendant to be evaluated by Dr. Phillip Resnick ("Resnick"), to determine his competency to stand trial. Defendant also requested, and was granted psychiatric evaluations by four other psychiatrists: Dr. Sandra McPherson ("McPherson"), Dr. Kurt Bertschinger ("Bertschinger"), Dr. S.M. Samy ("Samy"), and Dr. Oscar Markey ("Markey"). Thereafter, the trial court held a competency

hearing, wherein it was determined, based on Resnick's recommendation, that Defendant was competent to stand trial.

A jury convicted Defendant on July 27, 1983 of all counts and specifications, except for one of the aggravated robbery counts. After the mitigation phase of the trial, the jury recommended a sentence of death, which was accepted by the trial court, and Defendant was sentenced to death on August 10, 1983. Defendant was also sentenced to terms of seven to twenty-five years imprisonment on each attempted murder and aggravated robbery conviction.

Defendant timely appealed his convictions and sentence to the Ohio Court of Appeals for the Eighth District. The court found that Defendant was improperly convicted of two counts of aggravated murder for the death of Timothy Sheehan, and vacated one of the two convictions. The court affirmed the conviction and death sentence on the other aggravated murder charges, as well as the five specifications attached thereto, leaving Defendant with three aggravated murder convictions, and fifteen death penalty specifications. *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992 (Ohio Ct. App. 1984).

After a number of intervening appeals to the Eighth District Court of Appeals, and requests for remand to the Ohio Supreme Court, Defendant finally filed his merits brief with the Ohio Supreme Court on November 24, 1986, in which he raised sixty-four proposed errors of law. The Ohio Supreme Court issued an abbreviated opinion on April 13, 1988, affirming Defendant's convictions and sentence. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988).

Defendant then petitioned the U.S. Supreme Court for a writ of certiorari, but the petition was denied. *Spisak v. Ohio*, 489 U.S. 1071 (1989). Defendant spent the next six years filing and appealing denials of countless motions for post-conviction relief.

On December 15, 1995, Defendant filed a Notice of Intent to File a Petition for Writ of Habeas Corpus with this Court. Subsequent to filing the petition, Defendant filed a motion with this Court on June 13, 1997 to stay his execution, which was granted.

Defendant filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 9, 1997, raising thirty-three grounds for relief. The district court issued an Opinion and Order denying the petition on April 18, 2003, but the court granted Defendant a certificate of appealability as to thirteen of his claims. Defendant filed a Rule 59 motion to alter or amend judgment on July 29, 2003. In response to that motion, the district court granted an additional certificate of appealability as to one sub claim. Defendant timely appealed to this Court on July 31, 2003.

II. Factual History

In its rejection of Defendant's direct appeal, the Ohio Supreme Court set forth binding factual findings with respect to the overwhelming evidence adduced at Defendant's trial. Under 28 U.S.C. §2254(e)(1), Defendant has "the burden of rebutting the presumption of correctness by clear and convincing evidence." Defendant does not challenge these factual findings, so we adopt them below.

On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.

On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting, and was later able to identify his assailant as the appellant, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.

At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered the appellant, holding a gun, who ordered her back into the stall. Instead, Dartt shoved appellant out of the way and ran down the hallway. Appellant shot at her, but missed. A pellet was later removed from a wall in the hallway. Dartt identified the appellant as her assailant.

On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing shots from a window at 1367 East 53rd Street. The police were directed to appellant's apartment and appellant, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic pistol were observed in the room. Appellant made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a two-shot derringer under the couch cushions. Appellant was arrested

for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Appellant was later arrested, hiding in the basement of a friend's house. During a brief search of appellant's suitcase at the scene, police discovered the beeper pager belonging to Sheehan.

Appellant later admitted to shooting Rickerson for allegedly making a homosexual advance toward him; to killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder weapon.

Spisak, 521 N.E.2d at 800-01.

STANDARD OF REVIEW

In habeas appeals, we review the district court's legal conclusions de novo and the factual findings for clear error. *Jordan v. Hurley*, 397 F.3d 360, 362 (6th Cir. 2005). However, following the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1) (2000). The inquiry is "limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time [the defendant's] conviction became final." *Onifer v. Tyszkiewicz*, 255 F.3d 313, 317-18 (6th Cir. 2001). For purposes of 28 U.S.C. § 2254(d)(1), "clearly established law . . . 'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

A state court decision can be "contrary to" "clearly established federal law" if it applies a rule that contradicts the governing law set forth in

Supreme Court cases; or the state court decision confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams*, 529 U.S. at 405; *Bailey v. Mitchell*, 271 F.3d 652, 656 (6th Cir. 2001). The state court decision constitutes an "unreasonable application" of "clearly established federal law" where the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular state prisoner's case; or the state court either unreasonably extends a legal principle from a Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 407; *Bailey*, 271 F.3d at 655. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Id.* at 409.

AEDPA requires heightened respect for state court factual findings and legal determinations. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the Defendant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

DISCUSSION

I. Not Guilty By Reason of Insanity Defense

Defendant sought to present an insanity defense to the jury during the guilt phase of his trial, but the trial court disallowed the defense by: (1) striking the testimony of Defendant's expert, Markey; (2) refusing to allow any other experts to testify as to Defendant's sanity; and (3) refusing to instruct the jury as to an insanity defense. Defendant raised this issue on direct appeal to the Ohio Eighth District Court of Appeals, which found that the trial court did not err in striking Markey's testimony since it did little to alter the presumption that Defendant was sane, and was likely to have confused the jury on the issue. *Spisak*, 1984 WL 13992, at *5. The Eighth District Court of Appeals further found that Defendant was not entitled to a jury instruction on the insanity defense because Defendant had failed to meet his burden of going forward with evidence of legal insanity. *Id.* at *6. The Supreme Court of Ohio summarily affirmed the Court of Appeal's decision. *State v. Spisak*, 521 N.E.2d at 800. On habeas review, the district court agreed with the Eighth District Court of Appeals that Markey's testimony would not aid Defendant's insanity defense, and thus, that Defendant's constitutional rights were not violated by the exclusion of the testimony. The district court further found that Defendant was not entitled to a jury instruction on the defense. Defendant now appeals to this Court claiming that the district court erred in finding that Defendant was not denied a fair trial by the exclusion expert testimony and evidence related to Defendant's insanity defense, and that the trial court did not violate clearly established federal law in refusing to submit Defendant's insanity defense to the jury.

A. Exclusion of Expert Testimony and Evidence

Defendant first argues that the district court infringed his fundamental right to a fair trial by striking the testimony of his expert, Markey, and by excluding testimony and evidence from other experts related to Defendant's insanity defense. While it cannot be disputed that Defendant has a fundamental right to a fair trial, we do not agree that this right was infringed by the state trial court's evidentiary ruling excluding what it considered to be irrelevant and potentially prejudicial expert evidence.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations and quotations omitted). Having the opportunity to be heard is an essential component of procedural fairness. *Id.* Being allowed to present "relevant evidence is integral to that right." *Baze v. Parker*, 371 F.3d 310, 323 (6th Cir. 2004) (citing *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) for the proposition that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive").

Federal courts have long recognized, however, that "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citations omitted). A defendant's interest in relevant evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (citations omitted) ("In applying its evidentiary rules a State must evaluate whether the interests served by a rule

justify the limitation imposed on the defendant's constitutional right to testify."). "As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting Rock, 483 U.S. at 56).

The Supreme Court has, moreover, "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.* (citing *Rock*, 483 U.S. at 56; *Chambers*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. 14, 22-23 (1967)). "Only if an evidentiary ruling is so egregious that it results in a denial of fundamental fairness does it violate due process and thus warrant habeas relief." *Baze*, 371 F.3d at 323 (internal citations and quotations omitted); see also *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003) ("Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal citations and quotations omitted)).

In *Crane*, the Supreme Court dealt with this issue of reviewing state evidentiary rules and explicitly

> acknowledge[d] [its] traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of

> evidence . . . the Constitution leaves the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive . . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'

Crane, 476 U.S. at 689-90 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The Court further recognized that the States have the power "to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted."[1] *Id.* at 690 (citations omitted).

i. Markey's Testimony

After conducting four sessions with Defendant, Dr. Oscar Markey, one of several psychiatric experts retained by Defendant's trial counsel, submitted a report in which he diagnosed Defendant as suffering from a schizotypal personality and latent atypical psychotic disorder. Markey opined in his report that Defendant would not have been able to control his impulse to assault his victims, even though he knew that it was considered wrong by society. In light of this report, Defendant's trial counsel called Markey to testify at trial in support of the defense's

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[1] The *Crane* Court held, however, that "without 'signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures,'" under those circumstances, where the trial court had excluded evidence of the surrounding circumstances of a defendant's confession, that "the blanket exclusion of the proffered testimony about the circumstances of Defendant's confession deprived him of a fair trial." *Id.* at 690 (citations omitted).

contention that Defendant was insane at the time of the shootings.

Prior to allowing Markey to testify before the jury, however, the trial court conducted a fairly extensive voir dire in which Markey was questioned about his conclusions as to Defendant's mental state. During the voir dire, Markey testified that Defendant suffers from a "schizotypal personality disorder" and "atypical psychotic disorder," but that he could not say that Defendant was psychotic at the time of the killings. Markey later stressed that Defendant has a "latent psychotic condition," repeatedly emphasizing in response to questions from defense counsel as to whether Defendant suffered from a mental illness, that Defendant's mental illness was "latent" and that the "potential is there," but that Defendant "cannot be diagnosed as having an active psychotic illness." (J.A. at 1990-91.) When asked whether Defendant knew that what he did was wrong, Markey replied, "[i]n our society . . . I know that he knows that we believe it is wrong, and that in this society in which he is trying to cure these ills, society thinks what he did was wrong," but "in his view he did the right thing and there is nothing to apologize for." (J.A. at 2000.)

When defense counsel asked whether Defendant could refrain from these acts, Markey gave a long, rambling, and confusing answer that prompted several more questions from counsel, but he eventually replied that "certainly, there are times when he would refrain, and I think he must have refrained in the past from acts like this because the consequences might be uncomfortable for him." (J.A. at 2007.) Markey then contradicted himself when asked whether Defendant was unable to refrain from killing blacks and Jews, and responded that it would

seem that Defendant was unable to refrain from killing blacks and Jews. Markey then read from his report in which he stated that Defendant was "unable to control his impulses to assault, though he was at the time, aware of its being socially wrong." (J.A. at 2009-10.)

On cross examination, the prosecution challenged Markey on his theory that Defendant did not know the wrongfulness of his conduct.

> Q. Do you know what the legal test for insanity is?
>
> A. Yes.
>
> Q. What is that?
>
> A. Did he know right from wrong, was he able to control any impulses which would have interfered with his knowledge of right from wrong.
>
> Q. And would he be – or was he able to refrain from committing the acts that he committed.
>
> A. It was obvious, I think he knew the difference, but remember he is changing the world by this act.
>
> Q. Well, if you believe what he says, that he killed the Reverend because the Reverend made a homosexual pass, you would agree that has nothing to do with his Nazi theory?
>
> A. That's right.
>
> Q. You also agree that he refrained from killing any Jews because as far as we

> know, he is not charged with killing any Jews?
>
> A. Because of what?
>
> Q. He has not killed any Jews. Even if he espouses the philosophy of killing Jews, he has not done so. Therefore, we can conclude that he has refrained from killing the Jews. Fair enough?
>
> A. Yes.
>
> Q. I don't think we have any disagreement. You do say in all of the instances he knew the difference between right and wrong, and you do say in all of the instances he was able to refrain from committing those acts if he would have decided to refrain from doing it?
>
> A. Yes.

(J.A. at 2012-13.) After admitting that Defendant knew the difference between right and wrong, and was able to refrain from his conduct, Markey later further contradicted his earlier conclusion that Defendant could not refrain from killing blacks and Jews by conceding on re-cross examination that he essentially agreed with the conclusion of another expert, Resnick, that "defendant knew the difference between right and wrong and that he was able to refrain." (J.A. at 2027-28.) Despite these damaging and contradictory admissions, however, the trial court ruled that Markey's conclusion that defendant could not control his impulse to assault created a

question of fact for the jury, and decided to allow Markey to testify.

Once he was before the jury, Markey repeated his conclusions that Defendant suffered from a "schizotypal personality disorder" and a "possibility of a breakdown, which could equate mental illness." (J.A. at 2074.) Again, however, Markey still would not directly answer "yes" or "no" as to whether Defendant had a mental disease, but instead kept referring to the "potential," while conceding that Defendant did not "have an active mental disease." (J.A. at 2079.) At this point, the trial court excused the jury for an extensive sidebar, during which time the judge, in an effort to ascertain Markey's actual position on the issue of Defendant's sanity, asked Markey several direct questions about his diagnosis of Defendant.

> Q. Doctor, in your opinion, obviously, it is based on reasonable medical certainty, does Mr. Spisak have a mental disease, actively present?
>
> A. Actively, no.
>
> Q. Presently does he have a mental disease?
>
> A. No.
>
> Q. At the time these various crimes were committed, February 1, 1982 through August 3, 1982, is it your opinion based on reasonable medical certainty that Mr. Spisak had a mental disease at that time?
>
> A. On the basis of what I know, no.

(J.A. at 2080.) The judge then recalled the jury, and defense counsel was allowed to continue questioning Markey. On cross examination, the prosecution first got Markey to reaffirm that Defendant does not have a mental disease, stating "so, we can put that aside, mental disease and mental defect aside, and we agree that he does not have either one of these at this point, or in the past that you know of, correct?" (J.A. at 2090.) Markey answered in the affirmative. Later towards the end of the cross-examination, the following exchange occurred, at which time Markey restated that Defendant could refrain from killing:

> Q. All I'm indicating to you, doctor, and asking for your opinion is that he made a conscious decision to shoot, or not to shoot on each case that we have in this indictment?
>
> A. Yes, he was not in a frenzy where he didn't know what he was doing. He had a conception of what he was doing and he realized that he could have –
>
> Q. He could have refrained from pulling the trigger on any of those five, had he chosen to do so?
>
> A. Yes.

(J.A. at 2096.) Although Defendant's trial counsel then tried to rehabilitate Markey's testimony, it only proved to be further damaging when Markey stated on re-direct:

> The questions have been asked me before, indicate that in every instance in which he did assault, whether he killed or not, he was calculating and knew whether or not he could go ahead, in his

> view, he was positive in doing it, that he had enough conscious control over it to do it at a time when it would be to his advantage. . . .

(J.A. at 2097-98.)

The following morning, the prosecution filed an objection to the continuation of Markey's testimony on relevancy grounds, since Markey testified that Defendant did not suffer from a mental disease or defect at the time of the acts, and that Defendant knew the difference between right and wrong and was able to conform his conduct to the requirements of law. The prosecution moved that the testimony not continue and that it be stricken because it prejudiced the defense in that it reestablished the presumption of sanity, and because it did not add anything and was not relevant to the issue since the law already presumes sanity. The prosecution further moved that the defense be required to withdraw its plea of not guilty by reason of insanity because there was not "one scintilla of evidence offered that the defendant is anything but sane, and was anything but sane at any of the times in the five charges or five indictments." (J.A. at 2103-04.) After hearing arguments from both sides, the trial court granted the prosecution's motion, reasoning that when a plea of not guilty by reason of insanity is entered, the expert offered by the defendant "must meet a certain minimal standard," which the court concluded had not been met in this instance. (J.A. at 2118.)

Upon review of the transcript of Markey's testimony, we agree with the district court that the exclusion of Markey's testimony did not violate Defendant's fundamental right to a fair trial. At the outset, we would like to note that this Court

addressed a similar issue in the pre-AEDPA case, *Matlock v. Rose*, 731 F.2d 1236 (6th Cir. 1984). The defendant in *Matlock* appealed the district court's denial of his habeas petition, challenging the trial court's exclusion of a psychologist who testified that defendant Matlock knew right from wrong only on the intellectual level of an eight or nine year old. Id. at 1238. We rejected defendant's argument that "the exclusion of this testimony deprived him of his only defense, that of insanity," finding instead that the testimony proffered would not have supported an insanity defense under Tennessee law, and would in fact have probably undercut one. *Id.* at 1243 ("The evidence excluded . . . would not have made out a case of insanity . . . . At best, it would have shown that Matlock was retarded with some brain damage.").

We find the situation in *Matlock* to be somewhat analogous to the present case, and therefore conduct a similar analysis, beginning with Ohio's legal definition of insanity, and proceeding to consideration of whether the evidence proffered by Dr. Markey would have established that Defendant met this standard. We conclude that it would not have.

Under Ohio law, as it stood at the time of Defendant's trial, a person accused of a crime could be found to be "not guilty by reason of insanity" if "at the time of such conduct as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law."[2] *State v.*

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[2] Defendant correctly argues that the district court applied the wrong standard for an insanity defense under Ohio law at the time of his convictions. The district court utilized the standard for insanity set forth at Ohio Rev. Code § 2901.01(a)(14), which

Staten, 247 N.E.2d 293, 296 (Ohio 1969). As illustrated by the above-recounted excerpts, far from establishing that Defendant "had a mental disease or defect" and "did not know the wrongfulness of his conduct," Markey repeatedly stated that Defendant did not have a "present" mental defect or disease, and that Defendant knew the wrongfulness of his conduct. Thus, Markey's testimony could not have supported Defendant's insanity defense, and in fact, even more so than was the case in *Matlock*, would likely have severely undercut such a defense since Markey explicitly diagnosed Defendant as not meeting the necessary elements of the insanity defense under Ohio law.

We also agree with the Eighth District Court of Appeal's conclusion that "there was a high probability that [Markey's] testimony would have confused the issue in the minds of the jurors and would not have aided the jury in understanding the evidence or in reaching a determination an legal sanity." *Spisak*, 1984 WL 13992, at *5 ("[W]hen a defendant calls an expert to testify on the issue of legal insanity, that expert's testimony must still meet the basic requirements of the Rules of

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provides that "a person is 'not guilty by reason of insanity' relative to a charge of an offense only if he proves . . . that at the time of the commission of the offense, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his conduct." This was the incorrect standard because this definition of insanity did not take effect until 1990, seven years after Defendant's trial in 1983. Although this was the wrong standard, the district court's analysis of the issue of the admissibility of Markey's testimony and ultimate conclusion is still correct.

Evidence.").[3] Markey's testimony was often contradictory and inconsistent. He opined that Defendant did not consider his actions to be wrong because he was ridding the world of bad persons, but that Defendant knew that society considered his actions to be wrong. Markey first stated that Defendant could not refrain from killing blacks and Jews, but then contradicted himself on cross examination, admitting that Defendant could and did in fact refrain at times from engaging in such conduct. Markey also thought the Defendant was a schizotypal personality, but that Defendant had only a "latent" mental disease or defect, not one that was "actively present." For the most part, it is difficult for

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[3] In deciding the issues on appeal, the Ohio Eighth District Court of Appeals cited to the following rules of evidence:

> Rule 403:
>
> (A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury.
>
> (B) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.
>
> Rule 702:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

this Court, let alone a jury, to discern whether Markey actually believed that there was a clinical diagnosis for what was wrong with Defendant. It does seem blatantly apparent from his testimony, however, that Markey did not believe that Defendant met the legal definition of insanity under Ohio law. Therefore, Defendant's fundamental rights were not infringed by the trial court's decision to exclude Markey's testimony.

ii. Other Expert Reports and Evidence

We similarly agree with the district court that the trial court properly excluded the other expert reports where all of the experts opined that Defendant knew the wrongfulness of his conduct when he carried out the shootings. After the district court excluded Markey's testimony, the defense proffered Exhibits D through K, which included expert reports from doctors Markey, Resnick, McPherson, Bertschinger, Samy, Williger, and Althof, contending that these doctors would testify to Defendant's sanity and "would give a better profile of the characteristics and personality of the defendant Frank Spisak such that the Court would at that time charge on the issue of sanity to the jury." (J.A. at 2121.) A detailed review of the proffered reports show, however, that none of the doctors concluded that Defendant met the standard for insanity under Ohio law. Resnick concluded, first, that Defendant did not have a mental disease or defect at the time of the crimes, and second, that he "knew the wrongfulness and was able to refrain from each of the acts . . . charged." (J.A. at 3204.) McPherson made the following diagnosis:

> Mr. Spisak's functioning at this time is nonpsychotic, although he has potential

> for deterioration under condition of minimal stress of [sic] even in situations where there is lacking adequate external control . . . his accounts of the incidents do not meet the criteria for an insanity defense. Nonetheless, he is a significantly disturbed individual whose defect of mental state is pervasive, and was the general cause of his acts."

(J.A. at 3214-15.) Bertschinger also diagnosed Defendant as having a schizotypal personality and stated the following:

> The defendant, Frank Spisak, demonstrates severe defects in his personality structure . . . He has severe conflicts regarding his sexual identity and his sexual impulses are fused and intermingled with aggressive impulses . . . Generally speaking, personality disorders are not considered to be mental disease or mental illness when being used in an insanity defense. However, it is my opinion that Mr. Spisak's personality deficits are of such severity that he can be considered to have a mental illness or mental disease. However, in carefully reviewing his mental state at the time of the alleged crimes, it is my opinion that he knew the wrongfulness of his acts and had the ability to refrain from the acts.

(J.A. at 3217.) Samy's report from the Ohio Department of Mental Health stated in pertinent part that Defendant was sane at the time of all the shootings, and that Defendant "was found to be not mentally ill as defined by the Ohio Revised Code,"

although "he has a personality disorder and identity disorder." (J.A. at 3225.) Lastly,[4] Althof concluded that:

> While one could make a case for a chronic psychotic process, his ego dysfunctions are neither so pervasive nor profound, as to warrant such a severe diagnosis . . . A personality disorder diagnosis does not do justice to the severity of the patient's psychological condition and yet his record is not consistent with that of an overt psychotic disorder.

(J.A. at 3239.)

The partial dissent argues that Defendant had some right "to present evidence of his insanity cumulatively." Criminal defendants in Ohio do not have a right to cobble together an insanity defense by selectively relying upon favorable portions of psychiatric expert reports when no single report supports a finding of insanity. Nor do criminal defendants have an incontrovertible right to offer psychiatric testimony in all circumstances where they believe it might conceivably advance their defense. See *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982) (barring criminal defendants from "offer[ing] expert psychiatric testimony, unrelated to the insanity defense" to negate mens rea); *State v. Taylor*, 781 N.E.2d 72, 84 (Ohio 2002) (upholding a trial court decision to exclude expert testimony

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[4] Williger's report provides a detailed account of various interviews with Defendant and his family members, but does not evaluate the information to reach independent conclusions about Defendant's mental health.

which "did not support [the defendant's] insanity defense, since all three experts concluded he was not insane"). Further, criminal defendants certainly do not have a right to present the sort of irrelevant and confusing testimony proffered by the experts in Defendant's case. As previously discussed, Markey's testimony was riddled with contradictions: his statements on cross examination often directly countered those on direct. The single point of agreement among all of Defendant's other experts was that Defendant had a personality disorder. Finally, even if the trial court had admitted these reports, taken as a *whole*, they still would not have provided support for a "not guilty by reason of insanity defense." With the exception of Markey's internally inconsistent testimony, *none* of Defendant's experts found that "at the time of the criminal act with which he [was] charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act." See *Staten*, 247 N.E.2d at 299.

It was therefore consistent with Defendant's rights for the trial court to exclude this evidence. The Supreme Court has held that, under these circumstances, judges in the position of having to make these decisions must have "wide latitude" to exclude evidence that they think is irrelevant, potentially harmful or confusing to the jury. *Crane*, 467 U.S. at 689-90. While a defendant is entitled to strong latitude in presenting his defense, we are not willing to substitute our judgment for that of the state trial court in this instance, where the record shows that the trial court's decision was not objectively unreasonable, taking into consideration the language of the Supreme Court in *Crane*. Although the partial dissent likens this case to *Chambers* and *Crane*, clear distinctions lie between

those cases and Defendant's case. In *Chambers*, the trial court applied state evidentiary rules to prevent the defendant from adversely examining his witness, a third party who previously confessed to the crime charged against the defendant, and also excluded as hearsay the testimony of three witnesses that the third party confessed to the crime. *Chambers*, 410 U.S. at 291-92. The testimony excluded in *Chambers* was mutually reinforcing, and wholly exculpatory if credited by the jury. In Defendant's case, the psychiatric testimony and reports were contradictory – sometimes even internally inconsistent, as with Markey's stricken testimony at trial. Additionally, even if the jury credited these inconsistent reports, they did not necessarily exculpate Defendant. Finally, while the evidentiary rulings in Chambers were destructive of the trial court's truth-finding purpose, see *id.* at 297 n.8 ("The 'voucher' rule has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process."), the trial court's rulings here were consistent with the goal of truth-seeking since Defendant's contradictory and inconsistent expert testimony would only engender confusion and speculation.

In *Crane*, the Supreme Court found that a "meaningful opportunity to present a complete defense" included the right to present "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." 476 U.S. at 690 (internal citations omitted). There, the defendant confessed to the crime charged under coercive circumstances and, pursuant to a pretrial ruling on a motion to suppress, the court excluded all testimony at trial bearing on the circumstances of that confession. *Id.* at 690. Unlike the "potentially

exculpatory" and "indispensable" evidence in Crane, the expert testimony in Defendant's case merely established mental problems and not insanity. Thus, it cannot be said that such testimony rose to the level of "indispensable" or "potentially exculpatory." Without question, as the partial dissent asserts, Defendant's experts were "competent" and "reliable" in their field. Indeed, these experts so reliably discharged their function that they did not bend their findings or shade their words to find insanity where it did not exist. Their testimony, however reliable their reputations, could not be taken to establish Defendant's legal insanity under Ohio law. Far from "mechanistically appl[ying] the evidentiary relevancy standard" here – a result strongly disfavored where a defendant's right to present a defense is involved – the trial court gave Defendant's expert every opportunity to meet the court's evidentiary requirements. The trial judge allowed Defendant's expert to testify before the jury notwithstanding his persistent tendency to contradict himself during voir dire, entertained his internally inconsistent testimony before the jury, dismissed the jury for a sidebar during which the judge himself questioned Markey to clarify the expert's position, recalled the jury and allowed Markey to continue testifying, and ultimately entertained the arguments of both the prosecution and defense on the relevance of Markey's testimony. This cannot be offhandedly equated with the type of "mechanistic" application of evidentiary rules or "blanket exclusion" of evidence that so clearly deprives a criminal defendant of his right to present a defense.

The evidence in the record simply does not support a conclusion that Defendant's fundamental right to a fair trial has been infringed by the

exclusion of the expert evidence, where the experts did not diagnose Defendant as being insane within the legal definition under Ohio law. It was conceivably within the discretion of the trial court to have admitted this evidence, and perhaps, were we in the position of the trial judge, we might have permitted Defendant to present the testimony of his experts. Under the AEDPA standard, however, we cannot overturn the discretionary evidentiary rulings of a state trial court in the absence of evidence that the trial court acted in a manner that was contrary to, or a violation of, clearly established federal law.

The partial dissent draws support for the opposite conclusion from *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). Respectfully, such reliance is misplaced. As the partial dissent correctly observes, *Ake* held that "due process requires that indigent defendants be afforded the assistance of a psychiatrist in preparing a defense." In this case, Defendant benefitted from the assistance of not one, but seven experts in his attempt to demonstrate insanity. Those experts evaluated Defendant, diagnosed him, and prepared reports detailing their diagnoses. Not one of those seven experts could testify honestly and unequivocally that Defendant met Ohio's legal definition of insanity. Nor could their conclusions "cumulatively" justify that result. The *holding* in *Ake* does not require a trial court to permit such irrelevant testimony.

B. Refusal To Instruct The Jury As To The Insanity Defense

Defendant also charges that the trial court improperly refused to instruct the jury on the insanity defense. We disagree. The "not guilty by reason of insanity" defense is an affirmative defense under Ohio law, and the defendant has the burden of

going forward with the evidence of an affirmative defense.[5] Ohio Rev. Code 2901.05(A); see also *State v. Humphries*, 364 N.E.2d 1354, 1356 (Ohio 1977); *State v. Chase*, 378 N.E. 1064, 1068 (Ohio 1978) ("Under the statute, a defendant who pleads not guilty by reason of insanity has the burden of going forward with evidence of a nature and quality sufficient to raise the defense before the jury."); *State v. Robbins*, 388 N.E.2d 755, 758 (Ohio 1979) ("The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.").

Even though the burden of going forward is on the defendant, "[w]hen from the evidence reasonable minds may reach different conclusions upon the question of insanity, such question of fact is for the jury." *State v. Reynolds*, 550 N.E.2d 490, 495 (Ohio Ct. App. 1988); *State v. Filiaggi*, 714 N.E.2d 867, 889 (Ohio 1999) (quoting *State v. Thomas*, 434 N.E.2d 1356, syllabus (Ohio 1982)) ("The weight to be given the evidence and the credibility of the witnesses concerning the establishment of the defense of insanity in a criminal proceeding are primarily for the trier of the facts.") "If however, after giving the evidence the most favorable interpretation in favor of

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[5] Ohio Rev. Code 2901.05(a) provides: "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

the defendant, reasonable minds can come to but one conclusion and that conclusion is adverse to the defendant, it is the trial court's duty to rule on the issue as a matter of law." *Id.* (citations omitted) (holding that there was enough evidence to permit a reasonable jury to find that Reynolds was legally insane at the time the crime was committed; therefore, it was error for the trial court to withdraw the insanity defense from the jury and refuse to instruct the jury concerning the insanity defense).

We have already discussed what we believe to be the insufficiency of Defendant's proffered expert testimony and evidence for establishing an insanity defense. In addition to proffering the reports of the mental health experts, Defendant also called his sister and ex-wife to testify as to his mental state. Defendant's sister, Nadine, testified that Defendant once told her about an incident in which he killed somebody and that he seemed to take delight in the killing. "I thought he was crazy. He had that wild look in his eyes." (J.A. at 2131.) She also testified that she had often told Defendant that "he was crazy" and that there was "something wrong with [him]." (J.A. at 2131.) Nadine further testified about Defendant's involvement with Nazi groups and teachings, and said that she thought Defendant was insane for being a Nazi. She described incidents in which Defendant would dress in a Nazi uniform, but at other times wear the Star of David while listening to Hitler tapes. She also spoke about Defendant's cross-dressing. Nadine told the court that she thought that there was something dominating or possessing Defendant.

Defendant's ex-wife, Laverne Spisak, also testified about Defendant's listening to Hitler records, and his cross-dressing. (J.A. at 2174-76.)

Laverne testified that Defendant started crossdressing after a car accident in 1976 that "messed his mind up . . . he was a little sick . . . it affected his mind very bad." (J.A. at 2176-77.) She said that she told him that he was "sick in the head" and needed help. (J.A. at 2178.) Laverne described one incident in which Defendant brought home a man dressed as a woman, and went to bed with the man, leaving her on the couch. Laverne testified that she left Defendant at that point because she thought he was "sick in the head," but later tried to reconcile a couple of years later. (J.A. at 2180-82.)

Defendant seeks to rely upon the decision from the Ohio Second District Court of Appeals, *State v. Reynolds*, 550 N.E.2d 490 (Ohio Ct. App. 1988), where the court ruled that lay witness testimony could establish an insanity defense. In *Reynolds*, the trial court refused to instruct the jury on the insanity defense because the expert had concluded that defendant Reynolds was "psychologically troubled but not insane." *Id.* at 495. The Second District Court of Appeals reversed on the ground that Defendant had provided competent lay witness testimony from his sister, that went to the issue of Defendant's sanity. *Id.* at 496. ("Where the jury has competent testimony from lay witnesses that would permit the jury to conclude that a defendant's reason was so impaired by disease or other defect of the mind at the time of the criminal act that he either did not know that such act was wrong, or did not have the ability to refrain from doing that act, a jury is permitted to so find.").

The Court found that the testimony provided by Reynold's sister was enough to create a jury question on the issue of insanity where the sister testified "concerning Reynolds' extensive history of

hospitalization for mental illness, and his use of antipsychotic drugs." Id at 494. The sister provided information about Reynolds' erratic behavior when he is off his medication, and further testified that to her knowledge, Reynolds was not on his medication at the time of the assault that was the subject of the trial. Id. The court found that this testimony was enough "from which a reasonable juror might conclude that Reynolds' reason was so impaired at the time of the criminal act that he either did not know that such act was wrong, or did not have the ability to refrain from doing the act." *Id.* at 495.

In contrast to the lay witness testimony provided by the sister in Reynolds, the testimony of the lay witnesses in the present case was not of a nature or quality sufficient to create a jury question on the issue of Defendant's sanity. Defendant's ex-wife and sister described unusual, perhaps even bizarre behavior that certainly may have been questionable and alarming for Defendant's family, but this type of behavior does not raise a question of legal insanity. Our society is rife with cross-dressers, latent homosexuals, bisexuals and even Hitler-supporting Nazis. While this type of behavior may be considered socially unacceptable by many, it by no means is determinative of legal insanity.

Furthermore, juxtaposed against the testimony from Laverne and Nadine that Defendant was crazy or that "there was something wrong with him," there was also a great deal of evidence and testimony about the fact that Defendant selectively chose his victims and the times he would kill, in an effort to avoid being caught. This evidence suggests that Defendant was not unaware of the wrongfulness of his conduct or unable to refrain from committing the murders. Dr. Resnick testified and read

extensive extracts from his report of his interviews with Defendant, and Defendant's account of the various incidents. For instance, after his first encounter with the victim Timothy Sheehan, in which Defendant attempted to engage Sheehan sexually in the men's room at Cleveland State University, Defendant reported to Resnick that "he left the men's room because he was unsure if Mr. Sheehan might call the police, and spent 45 to 60 minutes in the library nearby." (J.A. at 2278.) Defendant also reported that he shot Reverend Rickerson because Rickerson was in "his stall," he was in a bad mood, and also because Rickerson persisted in making homosexual advances toward him. (J.A. at 2279.) Afterward, Defendant "ran out quickly because he was scared." Defendant admitted to Resnick that "he would not have shot him if others had been in the bathroom for fear of being caught." (J.A. at 2279.)

Defendant told Resnick that he tried to kill Coletta Dartt because he became angry when he heard people making fun of the "White People's Party." He decided to teach her a lesson and intended to "slap the shit out of her and rob her" when she came out of the ladies' room at Cleveland State. (J.A. at 2280.) Defendant also said that robbery was in part the motivation for the shooting of Timothy Sheehan. He said that he needed money and "he thought in his mind that it was not fair that this man had money and he did not" and "[h]e knew that if he did take money from him and let him live, the victim might identify him in the future." (J.A. at 2282.) Defendant then shot Sheehan four times, and afterward, he reported that he searched Sheehan for cash and left "real quick because he did not want to get caught." (J.A. at 2282.) Defendant also reported that the Friday after the shootings in the bathroom,

he and a friend went out "looking for black people to shoot," but did not manage to shoot any. (J.A. at 2283.) They tried again the following Sunday, but again abandoned their plan "rather than risk getting caught." (J.A. at 2283-84.) According to Defendant, his friend "was more conservative and discouraged him from shooting unless the situation was safe." (J.A. at 2284.)

Defendant's own testimony at trial also contradicts the idea that he was insane at the time of the killings. When asked why he killed Reverend Rickerson, Defendant responded that he killed Rickerson "because he was bothering me. He was making obscene lewd gestures at me . . . He wasn't leaving me alone." (J.A. at 1447.) Defendant himself testified that after shooting Sheehan, he picked up the brass casings from his gun because the brass is worth money and also because "it's sloppy to leave it laying around." (J.A. at 1602.) Defendant further testified that he shot Hardaway on the other side of town away from Cleveland State, where the other shootings had taken place, because "he didn't want the police to link the two shootings together and link it to [him]," and he "didn't want to get caught." (J.A. at 1791.) After testifying that he shot the victim Brian Warford sitting in the bus shelter eight times in the head because Warford was "one of the enemies," Defendant then said that he felt good about the shooting, but "was just worried about getting back across to the other side of the campus to where I put the car because I figured in the early morning hours it was so quiet somebody was bound to hear all the shots." (J.A. at 1573.) In further efforts to avoid being linked to the murders, Defendant cut off the barrel and rubbed off the serial numbers of the gun he used. (J.A. at 1767.) After police discovered that Defendant was the shooter,

they found Defendant hiding out in the cellar of a friend's basement until he could leave town to avoid capture. (J.A. at 1801.)

On the balance of the evidence presented at trial, we conclude that the trial court did not err in refusing to instruct the jury on the insanity defense. Defendant did not present sufficient evidence to make it an issue for the jury. The experts all concluded that Defendant was sane and knew the wrongfulness of his conduct. The evidence of decisions that were made by Defendant to not act at certain times or to take measures to avoid getting caught weigh heavily against a finding that Defendant was legally insane. Also, the mere fact that Defendant was engaged in Nazi activities and considered himself to be part of a race war does not create an inference that he was legally insane. Defendant testified that he wanted to "get as many [black people] as I could before I got caught, one thousand, a million, the more the better." (J.A. at 1449.) Defendant said he armed himself "for the race war." (J.A. at 1451.) Again, while these views are anti-social and probably evidence of a serious personality disorder, we are not prepared to hold that Neo-Nazi, racist and anti-Semitic views establish a lack of guilt by reason of insanity, where the evidence clearly suggests that Defendant did not have a mental disease or defect, and knew the wrongfulness of his conduct.

II. Ineffective Assistance of Counsel During Mitigation Phase

The Supreme Court first articulated the now familiar two-part test for determining whether counsel is ineffective in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant seeking to establish that his counsel's assistance was

ineffective must show: (1) that his counsel's performance was deficient, in other words, that it "fell below an objective standard of reasonableness;" and (2) that the defense was prejudiced by the attorney's deficient performance. *Strickland*, 466 U.S. at 687-88. Although trial counsel's performance here is subject to de novo review, the reviewing Court's scrutiny of counsel's performance is highly deferential, and counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996) (overruled on other grounds). The reviewing Court must "evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors." *Id.* (citations omitted). "Trial counsel's tactical decisions are particularly difficult to attack, and a defendant's challenge to such decisions must overcome a presumption that the challenged action might be considered sound trial strategy." *Id.* (internal citations and quotations omitted).

In order to establish deficiency under *Strickland*, Defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [Defendant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong of the *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The inquiry, when a defendant challenges a conviction, is whether "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating

circumstances did not warrant death." *Id.* at 695; see also *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (Defendant demonstrates prejudice if he can show that there is a reasonable probability that "at least one juror would have struck a different balance").

The Strickland Court explained that while strategic choices made after a thorough investigation

> are virtually unchallengeable . . . strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary.

Id. at 690-91. Thus it follows that any decision to forego mitigation evidence is unreasonable if not made after a reasonable decision to cease further investigation. *See id.*

A. Hostile Remarks During The Closing Argument Of The Mitigation Phase

Defendant first argues that his counsel rendered ineffective assistance during his closing argument at sentencing by repeatedly stressing the brutality of the crimes and demeaning Defendant. We agree. The transcript reveals that in the early part of the closing, trial counsel did focus rather heavily on what he called the aggravating circumstances and the heinousness of the crimes. Defendant's trial counsel addressed the jury, telling them that "so little really needs to be said about the degree of aggravating factors, clearly horrendous," and pointed out that no one involved in the trial was

ever going to forget it or Defendant. (J.A. at 3061.) Trial counsel went on to make the following disturbing remarks:

> [E]veryone of us who went through this trial, we know we can feel that cold day . . . or see that cold marble, and will forever . . . see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is . . . the reality of what happened there . . . you can smell almost the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death . . . and you can feel, the loneliness of that railroad platform . . . And we can all appreciate, and you can understand, and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into the muzzle of a gun that kept spitting out bullets . . . And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children . . . you and I and everyone one of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never [sic] what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance . . . There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky.

(*Id.* at 3062-65.) The district court concluded that this extremely graphic and overly descriptive recounting of Defendant's crimes were an appropriate part of trial counsel's strategy to confront the heinousness of the murders before the prosecution had the opportunity to do so. The district court reasoned that once counsel identified with their emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill. Had Defendant's trial counsel actually done the latter, and spent a substantial amount of the time humanizing and rehabilitating Defendant in the eyes of the jury by arguing that Defendant was misguided or mentally ill and deserved to have his life spared, then the district court might be correct that this was permissible trial strategy. The record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury. Instead, as Defendant argues, trial counsel further denigrated Defendant and even went so far as to tell the jury that Defendant was undeserving of mitigation.

Trial counsel's efforts at presenting mitigating evidence consisted of telling the jury about what he described as Defendant's "sick twisted mind" and his association with the Third Reich and the Nazis, and what counsel perceived it was like to be inside Defendant's mind, based on Defendant's testimony about the murders. While trial counsel did then try to stress that Defendant was mentally ill, even if not legally insane, trial counsel proceeded to undermine this limited effort by making the following inexplicable remarks:

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. He is sick, he is twisted. He is demented, and he is never going to be any different.

(J.A. at 3069.) Trial counsel's performance did not improve after this, but rather counsel continued to do further harm to Defendant by rambling incoherently towards the end of the closing statement about integrity in the legal system. Trial counsel's final moments were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation, but rather to discussing all the other participants in the trial. Namely, trial counsel discussed the jurors, lawyers, the judge, policemen, and the victims' families, and focused on the importance of the jury's decision to all of these various individuals, instead of arguing how and why the mitigating factors outweighed the aggravating factors. Most shocking of all, however, trial counsel suggested to the jury that either outcome, death or life, would be a valid conclusion, by stating to the jury that "whatever you do, we are going to be proud of you." (J.A. 3101.)

We find persuasive Defendant's argument that in pursuing this course, trial counsel abandoned the duty of loyalty owed to Defendant, as was the case in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). In *Rickman*, counsel pursued a similar strategy of attempting to portray his client as a "sick" and

"twisted" individual which should mitigate the death sentence. Trial counsel's strategy in *Rickman* involved repeated attacks on his client's character, eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. *Id.* at 1157. This court concluded that counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. *Id.* The court found that the defendant was effectively deprived of assistance of counsel in light of the severity of counsel's conduct. *Id.* at 1160.

We believe that trial counsel's actions discussed above are so egregious that they are equivalent to those in *Rickman*, and similarly deprived Defendant of effective assistance of counsel, in violation of the Sixth Amendment. Here, as in *Rickman*, trial counsel's hostility toward Defendant aligned counsel with the prosecution against his own client. Much of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim. As was the case in *Rickman*, "[th]e effect [counsel] created was not one of pity for a pathetic [Defendant], but one of hostility toward the hated and violent freak." *Id.* at 1160. In light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the "strong presumption" that counsel's actions constituted "sound trial strategy." *Strickland*, 466 U.S. at 689. Defendant is correct that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has

never done a good deed, is not deserving of no (sic) sympathy, and is entitled to no mitigation." (Def.'s Br. at 64.) Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead. Therefore, we reverse the district court's denial of habeas on this claim.

B. Failure To Adequately Investigate Defendant's Background

We find unpersuasive, however, Defendant's claim that trial counsel should have presented more evidence to the jury during the mitigation phase of the trial. The Supreme Court has now applied *Strickland* in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate and present mitigating evidence at the sentencing phase of a death penalty trial constitutes ineffective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Wiggins*, 539 U.S. at 537-38; *Williams*, 529 U.S. at 390. In those cases, the Court cautioned that trial counsel has an "obligation to conduct a thorough investigation of the defendant's background" in death penalty cases. *Wiggins*, 539 U.S. at 522 (citing ABA guidelines advising attorneys to conduct through investigations); *Williams*, 529 U.S. at 396. In this context, the Supreme Court has warned against a tendency to invoke "strategy" as a "*post-hoc* rationalization of counsel's conduct [rather] than an accurate description of their deliberations prior to sentencing" to explain counsel's decisions. *Id.* at 527.

This Court has to first determine whether counsel conducted a reasonable investigation of

Defendant's background. Prior to trial, an extensive social history was obtained on Defendant, based on interviews with Defendant, his father, mother, and two sisters as well as various medical records. The report contained information about the family dynamics, including the fact that Defendant's father was emotionally distant and that his mother was a strict disciplinarian. Defendant argues that this information should have led to further investigation into his background, and that trial counsel should have presented various childhood experiences as mitigating evidence. However, the only relevant background that Defendant argues should have been put forth is the fact that he had an extremely strict mother who humiliated and hit him when he displayed sexual behavior, and who also taught him to hate people of color and others whom she deemed to be "undesirable" or "repulsive." (Def.'s Br. at 68-72.) Defendant argues that this information would have helped the jury understand his troubled history and would have provided some explanation for his behavior.

Despite Defendant's claim that more information should have been presented, the record shows that the various mental health experts retained by defense counsel to establish an insanity defense all testified and talked about Defendant's childhood, and the fact that it was marked by social isolation and a lack of ability to form inter-group relationships. The experts also discussed Defendant's gender confusion, and how that was tied to violent tendencies and the urge to kill.

During Dr. Bertschinger's testimony, counsel inquired into, and Bertschinger discussed, Defendant's pursuit of a sex change operation. In light of the evidence that was presented, we do not

agree that trial counsel was ineffective in failing to properly investigate Defendant's background. Moreover, even if there should have been more investigation, Defendant must demonstrate that he suffered prejudice as a result of counsel's omission, and that at least one juror would have reached a different result had this additional evidence been presented. *See Wiggins*, 539 U.S. at 536; *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003). Defendant has not shown that a reasonable probability exists that one juror would have reached a different conclusion given additional evidence. The best chance of mitigation available was in fact the evidence that Defendant was, to some degree, mentally ill. If the extensive evidence of Defendant's severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation was not enough to sway jurors, then we do not believe that evidence that Defendant's mother was a strict disciplinarian would have changed the mind of at least one juror.

Furthermore, this additional evidence does not rise to the level that this court generally has required to demonstrate prejudice. See *Hamblin*, 354 F.3d at 490-91 (where counsel failed to discover evidence of extreme poverty, neglect, violence, and instability, as well as a mental disorder); *Coleman v. Mitchell*, 268 F.3d 417, 450-51 (6th Cir. 2001) (where counsel did not discover defendant's history of abandonment, physical and psychological abuse, and pedophilia, as well as personality disorder and probable psychosis); *Greer v. Mitchell*, 264 F.3d 663, 678 (6th Cir. 2001) (counsel did not follow-up on knowledge of family history which included violence, foster care, incarceration, and alcoholism); *Carter v. Bell*, 218 F.3d 581, 596-97 (6th Cir. 2000) (counsel did not investigate childhood history of violence and

instability). Defendant's only additional evidence is that his mother was a strict disciplinarian, his father was often absent, that his mother would hit him for expressing sexual behavior, and that his mother taught him to distrust black people. Taken together, this is not enough to establish prejudice. Indeed, Defendant's childhood appears to have been relatively stable, with no poverty, and an absence of physical abuse, other than corporal punishment.

We should also note that we find unpersuasive Defendant's argument that it was unreasonable for trial counsel to utilize the same experts who were retained to testify as to Defendant's sanity. This argument has no merit where the record establishes that these experts did in fact testify during mitigation about the effects that Defendant's childhood, sexual confusion, racism, and "personality disorders" may have had on his behavior. There was no need for counsel to retain a new battery of experts to essentially reproduce what had been done by doctors Markey, McPherson, and Bertschinger.

Lastly, we do not believe that it was unreasonable for trial counsel to push to have the mitigation phase of the trial begin the day after the jury rendered the verdict. Several of the experts were leaving town, and trial counsel decided not to seek a continuance. While Defendant argues that this expeditious push to mitigation meant that trial counsel had not had time to prepare the strongest possible mitigation case, we have no way to determine from the record below how or when trial counsel prepared for mitigation. As far as we know, trial counsel may have had, and certainly should have had, a team working on mitigation for weeks beforehand, thereby making it unnecessary to seek a continuance. We are not in a position to say that trial

counsel's failure to seek a continuance constituted a deficiency that caused Defendant prejudice.

In conclusion, we grant Defendant habeas relief on his ineffective assistance of counsel claim on the basis of counsel's hostile and inept statements and lack of advocacy during the closing argument of the mitigation phase of the trial.

III. Acquittal First Jury Instruction

Defendant next claims that the trial court unconstitutionally instructed the jury that its sentencing decision had to be unanimous and gave an improper "acquittal-first" jury instruction. The district court concluded, and we agree, that Defendant's argument has merit under this Court's prior holding in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). In *Davis*, this Court granted habeas relief to a death sentenced defendant because it determined that the acquittal-first jury instruction, combined with a verdict form that required the signature of all twelve jurors, likely led the jurors to conclude that mitigation factors also had to be found by all twelve jurors, thereby precluding an individual juror from giving effect to mitigation evidence not found by the others. *Id.* at 689.

While a trial court's sentencing phase instructions may require juror unanimity as to the results of the process of weighing aggravating circumstances and mitigating factors, the instructions cannot require unanimity as to the presence of a mitigating factor. *Mills v. Maryland*, 486 U.S. 367 (1988); *see also Roe v. Baker*, 316 F.3d 557, 563-64 (6th Cir. 2002); *Williams v. Coyle*, 260 F.3d 684, 702 (6th Cir. 2001); *Coe v. Bell*, 161 F.3d 320, 337-39 (6th Cir. 1998). Further, an "acquittal-first" instruction, which requires the jury to

unanimously reject a death sentence before considering other sentencing alternatives, is unconstitutional. *Mapes v. Coyle*, 171 F.3d 408, 416-17 (6th Cir. 1999). In *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990), the Supreme Court ruled unconstitutional any requirement that "prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." Under *McKoy*, each juror must be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. *Id.* at 443; *Mills*, 486 U.S. at 374-75. Aggravating factors must be found unanimously because they are the elements of the murder offense that make the defendant death eligible. *Davis*, 318 F.3d at 687. "Mitigating factors, on the other hand, are not viewed as elements of the crime but rather as evidence relevant to a defendant's character or record or other circumstances of the offense that might lead a sentencer to decline to impose the death sentence." *Id.* at 688. Therefore, a state may not require unanimity in finding mitigating factors because such a requirement "impermissibly limits jurors' consideration of mitigating evidence." *Id.* (citing *McKoy*, 494 U.S. at 444). "In fact, as *Mills* and *McKoy* hold, any requirement that mitigating factors must be found unanimously is incoherent." Id. In other words, "in order for Eighth Amendment law on mitigating factors to be coherent and capable of judicial administration without serious confusion, a capital jury must understand that . . . a finding with respect to a mitigating factor may be made by one or more members of the jury." *Id.* (internal citations and quotations omitted).

In light of the case law discussed above, this Court's inquiry in the present case is, "whether

there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* (quoting *Jones v. United States*, 527 U.S. 373, 390 (1999); *Boyde v. California*, 494 U.S. 370, 380 (1990)). We think that the answer is "yes." During the mitigation phase, the trial court read the following instructions to the jury:

> [T]he procedure which you must follow in arriving at your verdict in this sentencing hearing is set forth in Section 2929.03 of the Revised Code of the State of Ohio . . . you must determine whether, beyond a reasonable doubt, the aggravating circumstances, which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case. If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court. I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.
>
> A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.

> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court . . . .

(J.A. at 3146-47.) These instructions are virtually identical to those given in *Davis*, which this Court determined are "acquittal-first" jury instructions that failed to instruct the jury "that it need not be unanimous in rejecting the death penalty." *Davis*, 318 F.3d at 689. The *Davis* Court found that not only did these instructions reflect a unanimity requirement, but the verdict form itself also reflected one, in that it had a spot for all twelve signatures under a statement professing that the jury found beyond a reasonable doubt that the aggravating factors did not outweigh the mitigating factors. *Davis*, 318 F.3d at 689.

Similarly, in the present case, the verdict form also reflected a unanimity requirement for a finding that the mitigating factors outweighed the aggravating factors. The trial court told the jury that in order to impose a sentence of death, all twelve had to sign under the statement on the verdict form stating that "we the jury, in this case, being duly impaneled and sworn, do find beyond a reasonable

doubt that the aggravating circumstance . . . was sufficient to outweigh the mitigating factors . . . we the jury recommend that the sentence of death be imposed . . . ." (J.A. at 3149.) The trial court further explained the method for using the verdict forms in the following manner:

> There are four separate jury forms for counts five, six and . . . eight. Now, there is also a set of verdict forms, same count numbers, read [sic] as follows:
>
> 'We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parol eligibility after serving' – there is an asterisk for a spot on the verdict form for you to fill in either 20 or 30 years of imprisonment. And again, all twelve of you must sign whatever verdict it is you arrive at [sic] must be signed in ink.

(J.A. at 3149.) The instructions as to how to acquit for death and impose a life sentence did not differ at all from the instructions as to how to impose death. In explaining the forms, the trial court indicated that all twelve signatures were required to impose a sentence of death, and to acquit for death and impose a life sentence. As we stated in *Davis*, this instruction,

> combined with the jury verdict form, not only 'could' but by its plain language 'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating circumstances, an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty. Further adding to the confusion, the jury was never told, either expressly or impliedly, that individual jurors may consider mitigating factors in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor.

Davis, 318 F.3d at 689-90.

In conclusion, we find that the silence on the lack of unanimity required to find mitigating circumstances, the improper "acquittal-first" jury instruction, and the misleading verdict form and instruction as to how to use the verdict form, would have led a jury to apply an unconstitutional unanimity standard at all stages of the deliberative process. See *id.* at 690.

IV. Clemons Violation

Defendant next argues that the trial court improperly instructed the jury on multiple aggravating circumstances for each aggravated murder charge. While we agree with Defendant that the jury was improperly instructed, the error was later remedied by the Ohio Supreme Court.

In *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990), the Supreme Court held that the "[f]ederal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review." According to the Court,

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more remaining aggravating factors outweigh the mitigating evidence.

Id. at 745. "We see no reason to believe that careful appellate weighing of aggravating . . . circumstances in cases such as this would not produce 'measured consistent application' of the death penalty or in any way be unfair to the defendant." *Id.* at 748. During the reweighing process, the state appellate court may not automatically affirm the defendant's death sentence. *Id.* at 752. Rather, the court must give the defendant "an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Id.* at 749. Recently, in *Brown v. Sanders*, 126 S.Ct. 884, 892 (2006), the Supreme Court announced the new rule that:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper

> element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

The Court's concern in *Brown* was "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have been weighed in favor of the death penalty," but "such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." *Id.* (emphasis in original).

Defendant was indicted on four separate counts of aggravated murder, with a total of nineteen specifications. On appeal, the Eighth District Court of Appeals determined that Defendant was improperly convicted of two counts of aggravated murder for the death of Timothy Sheehan, stating that:

> The appellant was indicted on four counts of aggravated murder for the murders of three people. Two counts of aggravated murder, the fifth and sixth counts of the indictment, were for the murder of one individual, Timothy Sheehan. The appellant was subsequently convicted for and sentenced on all four counts of aggravated murder . . . Accordingly while it was proper for the appellant to have been indicted on two separate counts of aggravated murder for the murder of Timothy Sheehan he could only be convicted on one of those counts.

Spisak, 1984 WL 13992, at *7. The Eighth District Court of Appeals thus vacated Defendant's conviction on the fifth count of aggravated murder, relating to Sheehan's death, as well as the specifications attached thereto. *Id.* The court of appeals then reweighed the aggravating and mitigating circumstances as they related to the remaining counts and specifications, and upheld the convictions and sentences on those counts. *Id.* at *8. Subsequently, the Ohio Supreme Court noted that the trial court had also failed to merge certain specifications, and held the following:

> Proceeding to our independent weighing of the aggravating circumstances and mitigating factors presented herein, we note that appellant's three aggravated murder convictions specify fifteen separate aggravating circumstances under R.C. 2929.04. However, as pointed out by appellant in his first proposition of law, for purposes of sentencing the doctrine of merger herein applies. Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. Although the court of appeals did not apply the

> merger doctrine below, we have determined that the jury's consideration of the duplicative aggravating circumstances during sentencing did not affect their verdict. Furthermore, we have independently determined that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Spisak, 521 N.E.2d at 803.

After reviewing the state court proceedings, the district court held, and we agree, that the Ohio Supreme Court did not unreasonably apply federal law in independently reweighing the aggravating and mitigating factors, and upholding Defendant's convictions and sentence. While it is undisputed that the trial court committed error in not merging the death penalty specifications, the Ohio Supreme Court's independent reweighing was sufficient to remedy any error.

It is also clear that after merging the duplicative aggravating circumstances, the Ohio Supreme Court gave the required individualized sentencing determination, *see Clemons*, 494 U.S. at 749, in reweighing Defendant's death sentence:

> Of the mitigating factors specified in R.C. 2929.04(b) appellant relied solely on his allegations that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offense. Although there was testimony that appellant had characteristics of borderline and schizotypal personality

> disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.
>
> Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offense. Nothing in the nature and circumstances of these deliberate murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond reasonable doubts, on the side of the aggravating circumstances of which the appellant was convicted.

State v. Spisak, 521 N.E.2d at 803-04 (internal citations omitted). Unlike the case in *Clemons*, this Court can clearly discern that the Ohio Supreme Court did in fact employ the proper method of reweighing the aggravating and mitigating factors before upholding the death sentence. *Clemons*, 494 U.S. at 741.

Moreover, under the recently-decided *Brown* decision, which states that the sentence is unconstitutional unless the jury could give

aggravating weight to the same facts and circumstances under one of the other sentencing factors, the reweighing was still sufficient to cure the error where the Ohio Supreme Court merely invalidated some of the specifications because they were duplicative of other specifications that were also considered by the jury. *Brown*, 126 S.Ct. at 892. The jury was able to give aggravating weight to the same facts and circumstances in the remaining murder convictions and death penalty specifications that were properly submitted to the jury.

We thus find that any error related the weighing of aggravating and mitigating factors during the sentencing phase of Defendant's trial was cured by the Ohio Supreme Court's reweighing of the factors, and therefore the Ohio Supreme Court did not violate clearly established federal law in upholding Defendant's death sentence.

V. Prosecutorial Misconduct

We lastly turn to Defendant's prosecutorial misconduct claim. "In deciding whether prosecutorial misconduct mandates that habeas relief be granted, the Court must apply the harmless error standard." *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002) (quoting *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997)). The relevant question is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Post-AEDPA, this Court has adopted a two-step test to determine whether prosecutorial misconduct violates a Defendant's due process rights. First, we consider whether the prosecutor's remarks were improper. *Id.* at 452. If we determine that the remarks were improper, then we must "apply the four-factor test

set forth in *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994), to determine 'whether the impropriety was flagrant' and thus violated the defendant's due process rights." *Id.* (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). The four factors to consider are: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; (4) whether the evidence against the defendant was strong." *Id.*

We must first consider Defendant's allegations of prosecutorial misconduct and determine whether the statements were improper before proceeding to an analysis under the four factors. The district court found that while some of the prosecutor's remarks may have been "repugnant, they did not deny Spisak due process or inject any fundamental unfairness into the trial." (J.A. at 238.) Overall, we agree.

A. Beverly Murphy as a Rebuttal Witness

First of all, we do not believe that it was improper for the prosecution to call Murphy as a rebuttal witness, but even if it was, none of the testimony elicited from Murphy was at all prejudicial to Defendant. The prosecution called Murphy, over the objection of the defense, to rebut the testimony of Dr. Bertschinger. The district court ruled that Murphy's testimony did not rebut Bertschinger's testimony and that the "trial court erred when it permitted Murphy to testify," but that Defendant was not prejudiced by anything that Murphy said. (J.A. at 236.) We disagree with the district court's conclusion that Murphy's testimony did not constitute rebuttal testimony.

The trial court allowed Murphy to be called as a rebuttal witness over the defense's objection because the prosecution had asked Bertschinger questions about the relationship that Defendant, a self-professed Nazi supporter and white supremacist, claims to have had with Murphy, an African-American prostitute. Bertschinger opined that Defendant had a romantic relationship with Murphy, which reflected his personality disorder, given his alleged hatred of African-Americans. In response, the prosecution called Murphy who contradicted this characterization of her relationship with Defendant, testifying that the relationship was nothing more than a business relationship. Murphy testified extensively about the frequency and manner in which Defendant compensated her for sexual services, which included giving her guns. This testimony was appropriate to rebut Bertschinger's contention that Defendant had a romantic relationship with Murphy.

Regardless, however, of whether the testimony was in fact rebuttal, we agree with the district court that even if the testimony was inappropriate, it was not, under the first of the four *Carter* factors, prejudicial to Defendant. Murphy did not reveal anything new that the jury had not heard before, and her testimony was not inflammatory or damaging to Defendant. She merely recounted facts that the jury had already heard, and offered her perspective that she and Defendant's relationship was nothing more than a business arrangement. Further, much of the testimony that Defendant challenges, was actually given in response to defense counsel's questioning on cross-examination. We therefore conclude that Murphy's testimony did not render Defendant's trial fundamentally unfair.

B. Improper Remarks During The Mitigation Phase

Defendant next claims that the prosecutor made improper comments during its cross-examination of Bertschinger during the mitigation phase of the trial. Again, we find this claim to be without merit. First Defendant argues that the prosecutor improperly described him as a whore, but the record reveals that while the prosecutor did refer to Defendant's homosexual prostitution, he did not use the term whore. Moreover, these remarks were in reference to Bertschinger's testimony that Defendant admitted engaging in homosexual prostitution, and that these activities contributed to the dissolution of Defendant's marriage. These comments were therefore not improper.

It was also not improper for the prosecution to make reference to Dr. Markey's stricken testimony where defense counsel "opened the door" to this questioning by addressing Markey's report on direct examination. Defendant also claims that the prosecution improperly stated that Defendant "wanted to be a pimp," but the record reveals that the question was posed to Bertschinger as part of a discussion of Defendant's tendency to date black prostitutes and have them live in his home. Again, we do not believe that the remark was improper since it was only a passing reference and was posed as a legitimate question; but even if it was improper, we still find that any potential prejudice would have been minimal and would not have impacted the fundamental fairness of the trial.

We also do not believe that Defendant was prejudiced by any of the prosecutor's remarks during the prosecution's closing arguments of the mitigation phase of the trial. The prosecutor's argument was

devoted to demonstrating that Defendant's personality disorder did not outweigh his culpability for the murders he had committed, and that Defendant's actions were voluntary and he knew what he was doing when he committed the crimes. Out of thirty-three pages of argument, Defendant points to a few isolated comments to try to establish that his due process rights were violated. Defendant points out that the prosecution accused him of fabricating testimony; of being unwilling to support his wife; characterized Defendant as having no remorse; characterized the expert testimony as insulting and being mumbo jumbo; likened Defendant to a rat who hides in the basement; commented that Defendant would not have pled not guilty by reason of insanity if two of the witnesses had not survived; and asked the jury "how many people does he have to kill before we say enough is enough." None of these minimal, isolated remarks, even if improper, prejudiced Defendant or rendered his trial fundamentally unfair.

C. Cross-Examination of Defendant

Lastly, Defendant argues that the prosecution committed misconduct during his cross-examination by questioning Defendant about his bizarre political and religious beliefs, his receipt of public assistance, his failure to support his family, his homosexuality, his activities as a male prostitute, and treatment of his wife. Again, we find this argument to be without merit where the record reveals that the majority of these issues were in fact raised by Defendant's trial counsel during direct examination. Trial counsel's direct examination of Defendant focused on Defendant's political and religious beliefs, associations with Nazis, hatred of blacks and Jews, and how those hatreds drove him to the killings.

Defendant also testified on direct about his homosexual activity, cross-dressing, and consideration of a sex change operation. Defendant further testified that he could not recall the reasons for his divorce, but that he continued to support his wife and daughter afterward. As these matters were addressed on direct, they were the proper subject of cross-examination.

We therefore conclude that the district court properly found that there was no prosecutorial misconduct that denied Defendant due process or injected any fundamental unfairness into Defendant's trial.

CONCLUSION

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part. We **AFFIRM** the judgment of the district court as it relates to issues I, IV, and V, but we **REVERSE** the district court's judgment as to issues II and III, and **REMAND** with instructions to grant the Writ as to issues II and III. Accordingly, we deny habeas relief with respect to the determination of Defendant's guilt, but remand for a new mitigation phase trial.

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I concur in the majority opinion, except for its treatment of Issue 1, Spisak's insanity defense. I believe that the trial court's exclusion of expert testimony and evidence regarding Spisak's insanity defense and the trial court's refusal to submit the insanity defense to the

jury violated Spisak's rights to a fair trial and to present a complete defense, rights long recognized by the Supreme Court. Therefore I would remand this case to the district court with instructions to grant a conditional writ of habeas corpus, giving the State of Ohio 180 days to retry Spisak or release him from custody.

Spisak claims that he was legally insane because of a severe personality disorder (which manifested itself with the bizarre and seemingly inconsistent beliefs and behaviors including racial and ethnic hatred and sexual deviance) and that he was entitled to present evidence of his insanity cumulatively, rather than needing to produce a singular expert who could testify to both prongs of the Ohio insanity standard.

In order to succeed on his affirmative insanity defense, Spisak needed to "establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act." *State v. Staten*, 247 N.E.2d 293, 299 (Ohio 1969) (footnote omitted). When insanity is pleaded as a defense, and the evidence is such that "reasonable minds may reach different conclusions upon the question of insanity, such question of fact is for the jury." *State v. Gaines*, 318 N.E.2d 857, 864 (Ohio Ct. App. 1974) (internal quotation marks omitted). "If, however, after giving the evidence the most favorable interpretation in favor of the defendant, reasonable minds can come to but one conclusion and that conclusion [is] adverse to defendant, it is the court's duty to rule on the issue as a matter of law." *Id.* (internal quotation marks omitted).

Spisak argues that "although none of the defense experts were prepared to specifically conclude that Spisak was legally insane, their testimony was being presented as relevant and material to specific elements of the insanity defense, from which the defense thereby hoped to meet the burden of proof supporting an insanity defense."1 Appellant Br. at 20. Spisak is correct that cumulatively, his psychiatric experts did provide support for the necessary insanity elements. In his report on the issue of sanity at the time of the act, Dr. Bertschinger stated that it was his opinion that "Mr. Spisak's personality deficits are of such severity that he can be considered to have a mental illness or mental disease." J.A. at 3217 (Bertschinger Rep. at 2). Dr. Markey's report and proffered testimony supported Spisak's claim that he was unable to refrain from committing the criminal acts. J.A. at 3192 (Markey Rep. at 3) ("I believe Spisak is in a latent psychosis (grandiose, paranoid, lacking in finer feelings, etc.) and that he was unable to control his impulses to assault, though he was at the time, aware of it's being socially wrong."); J.A. at 2082 ("I would say that [Spisak] was aware [that his actions broke the law], and he was unable to change his actions even though he knew that he was doing something that was against the law."); J.A. at 2083 (agreeing that Spisak's personality disorder was of such gravity that he would not be able to conform his conduct to the requirements of the law). Markey wavered on cross examination on his opinion that Spisak could not control his actions, but then on redirect restated that he believed Spisak was unable to control his impulse to assault. J.A. at 2093-97 (Trial Tr. at 1992-96).

Under the *Gaines* standard above, when giving Spisak's expert evidence the interpretation

most favorable to Spisak, I conclude that reasonable minds could reach different conclusions about his sanity. Therefore, the issue of Spisak's insanity should have been submitted to the jury to allow it to consider his insanity defense. *See Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). I also believe that Spisak's argument that the Supreme Court of Ohio's perfunctory dismissal of this claim was an unreasonable application of federal constitutional law has merit. The Supreme Court has recognized the essential nature of expert testimony in presenting an insanity defense, holding that due process requires that indigent defendants be afforded the assistance of a psychiatrist in preparing a defense. *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (stating that "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.'") (footnote omitted). Furthermore, while most violations of state law are not sufficient to justify habeas relief, "[w]hen an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Adverse evidentiary rulings by state courts do not harm a defendant's due process rights unless they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (internal quotation marks omitted). The Supreme Court has repeatedly held, however, that a criminal defendant's right to present a defense, including presenting witnesses on his behalf, is a fundamental right. *See Washington v. Texas*, 388

U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.") (emphasis added); *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("We have long interpreted this standard of [fundamental] fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.") (emphasis added); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). In this case, Spisak argues he was unable to present expert evidence about his significant mental health problems, thereby limiting his fundamental right to present a complete defense.

In addition, clearly established Supreme Court precedent holds that a state violates a defendant's right to a fair trial when it prevents him from introducing evidence essential to his defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (concluding that the state court's refusal to allow the defendant to introduce testimony regarding the circumstances in which he confessed to the police deprived him of a fair trial); *Chambers*, 410 U.S. at 302 (holding that the state court's exclusion of evidence critical to defendant's defense, coupled with the refusal of the state to let the defendant cross examine a witness, denied him due process). In *Chambers*, the defendant argued that the state court violated his constitutional rights when it rejected potentially exculpatory witness testimony because it was hearsay not meeting any recognized exceptions. The *Chambers* Court acknowledged the need for defendants wishing to present evidence to comply

with a state's "established rules of procedure and evidence," and stated that "perhaps no rule of evidence has been more respected or more frequently applied in jury trials" than the hearsay rule. Id. at 302. Nevertheless, because the evidence proffered by the defense "bore persuasive assurances of trustworthiness" and "also was critical to [the defendant's] defense," the Court concluded that the defendant's constitutional rights required its admission. *Id.* The Court stated, "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

In *Crane*, the Supreme Court also held that state evidentiary rules must sometimes give way to a defendant's constitutional rights. The Court stated that a defendant's constitutional right to be heard "is an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." *Crane*, 476 U.S. at 690. The *Crane* Court recognized the traditional respect afforded to the states in determining their own criminal trial procedures and rules. Notwithstanding the Court's "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts," the Court held, "we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." *Id.* at 689-90 (emphasis added). The Court stated, the "[p]etitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed." *Id.* at 691 (emphasis added). The Court noted that it was not passing

judgment "on the strength or merits of that defense," but that it thought "it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of [the defense] succeeding." *Id.* (emphasis added).

Here, Spisak's expert evidence (including Markey's testimony and the reports prepared by Bertschinger and the other experts) was as integral to Spisak's entire defense as was the hearsay evidence in *Chambers* and the confession evidence in *Crane*. Here the trial court mechanistically applied the evidentiary relevancy standard, resulting in the "blanket exclusion of the proffered testimony" of experts relating to his mental health. Crane, 476 U.S. at 690. Spisak's "entire defense" was that he was legally insane and therefore did not possess the culpability necessary to commit the murders, and it is "plain" that his ability to introduce expert evidence of his mental problems was "indispensable" if his insanity defense was going to have any chance of succeeding. *Id.* at 691. The proffered expert evidence also appears to meet the levels of reliability that the Court demanded in *Chambers* and *Crane*. Spisak's expert testimony came from "competent, reliable" psychiatric and psychological experts repeatedly relied upon by the Ohio courts, *Crane*, 476 U.S. at 690, and it "bore persuasive assurances of trustworthiness." *Chambers*, 476 U.S. at 302. The evidence would have been subject to cross examination by prosecutors, allowing them ample opportunity to point out the numerous conclusions contrary to Spisak's insanity defense. Yet without this evidence, the question of Spisak's sanity never even reached the jury. In light of these Supreme Court precedents holding that a defendant must be allowed to present evidence critical to his defense, I

would conclude that the Supreme Court of Ohio's summary rejection of Spisak's claim was an unreasonable application of clearly established Supreme Court precedent. I would remand this case to the district court with instructions to grant a conditional writ of habeas corpus, giving the State of Ohio 180 days to retry Spisak or release him from custody.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK G. SPISAK, JR.,

Petitioner,

v.

RALPH COYLE, WARDEN,

Respondent

Case No.: 1 :95 CV 2675
JUDGE SOLOMON OLIVER, JR.
MEMORANDUM OF OPINION AND ORDER

Frank G. Spisak, ("Spisak" or "Petitioner") petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Spisak submitted a Petition on April 9, 1997 (Doc. No. 19). Spisak challenges the constitutional sufficiency of his jury convictions for four counts of aggravated murder with nineteen death penalty specifications, three counts of aggravated robbery, and one count of attempted murder. Spisak also challenges the trial court's imposition of the death penalty for his murder convictions. The Respondent, represented by the Ohio Attorney General, filed a Return of Writ (Doc. No. 35), to which Spisak filed a Traverse on September 24, 1997 (Doc. No. 79).

For the reasons discussed below, the court denies Spisak's Petition for writ of habeas corpus.

I. PROCEDURAL HISTORY

On March 29, 1983, the Cuyahoga County Grand Jury indicted Spisak on four counts of aggravated murder in violation of Ohio Rev. Code § 2903.01; three counts of aggravated robbery in violation of Ohio Rev. Code § 2911.01; one count of attempted murder in violation of Ohio Rev. Code § 2903.02, and one count of receiving stolen property in violation of Ohio Rev. Code § 2913.51. Pursuant to Ohio Rev. Code § 2929.04(A), the aggravated murder counts contained nineteen death penalty specifications.

Spisak entered a plea of not guilty by reason of insanity as to all counts on April 8, 1983. Prior to trial, the court ordered Spisak to be evaluated by Dr. Philip Resnick, a psychiatrist, pursuant to Ohio Rev. Code § 2945.39. Upon Spisak's request, the court ordered he also be evaluated by Dr. Sandra McPherson, Dr. Kurt Bertschinger, Dr. S.M. Samy and Dr. Oscar Markey. Thereafter, the court held a hearing to determine whether Spisak was competent to stand trial. Dr. Resnick determined that Spisak was competent to stand trial. The court agreed with Dr. Resnick's findings.

Spisak also moved to suppress evidence seized at the search of his home on September 4, 1982. The court held a hearing on the motion but subsequently denied it, finding that Spisak's Fourth and

Fourteenth Amendment rights were not violated during the police search and seizure of guns found in Spisak's apartment.

Following trial, a jury convicted Spisak on July 27, 1983, of all counts and specifications, with the exception of one of the aggravated robbery counts. After the mitigation phase of the trial, the jury determined the aggravating circumstances outweighed the mitigating factors and recommended a sentence of death. The trial court accepted the jury's recommendation and sentenced Petitioner to death for each charge of aggravated murder on August 10, 1983. In addition, the trial court sentenced Spisak to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

Spisak timely appealed his convictions to the Ohio Court of Appeals for the Eighth District.[1] The Court of Appeals affirmed the conviction after vacating the aggravated murder conviction on the fifth count of the indictment as well as the five specifications attached thereto. *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992 (Ohio Ct. App. July

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[1] Originally, Spisak's appellate counsel raised one claim on appeal: "Whether or not the trial court erred by ruling that before an expert doctor could testify before the jury that the expert doctor must have found the defendant-appellant to be 'legally insane.'" Petition at 8. Spisak's initial appellate counsel were the same counsel who represented him during trial.

19, 1984).[2] On September 12, 1984, Spisak filed a timely Notice of Appeal to the Ohio Supreme Court.

Thereafter, Spisak received new counsel from the Ohio Public Defender Commission, who filed a motion to remand the case based upon previous counsel's failure to have the entire trial transcript submitted to the appellate court as required by Ohio Rev. Code § 2929.03(G). The Ohio Supreme Court granted the motion and ordered the Court of Appeals to undertake a second review after receiving the supplemented record. Spisak then moved the Court of Appeals to permit him to raise additional assignments of error. The court denied the motion and reaffirmed Spisak's convictions and death sentence. Spisak again filed a motion to remand with the Ohio Supreme Court, requesting that court to instruct the Court of Appeals to permit Spisak's new counsel to raise additional issues. On November 6, 1985, the Ohio Supreme Court granted the motion "with specific instructions to the court that counsel

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[2] The Grand Jury had indicted Spisak on two counts of aggravated murder for the murder of Timothy Sheehan pursuant to Ohio Rev. Code § 2941.25(A) which reads:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

Consequently, the Court of Appeals determined that although Spisak was properly indicted for two counts of aggravated murder in connection with Sheehan's death, he could only be convicted of one of those counts. The Court of Appeals, thus, vacated one of the convictions. *Id.* at *7.

for Appellant be permitted to participate in the review process as required by the Sixth and Fourteenth Amendments of the United States Constitution." Petition at 11. After accepting a new twenty-page brief and holding two hearings in which Spisak's new counsel participated, the Court of Appeals again affirmed Spisak's convictions. *State v. Spisak*, No. 82884, slip op. (Ohio Ct. App. May 27, 1986). On July 2 I, 1986, Spisak moved the Ohio Supreme Court for a third remand, alleging that the Court of Appeals failed to follow the Supreme Court's November 6, 1985 Order. The Supreme Court, however, denied the motion.

On November 24, 1986, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four propositions of law.[3] The Ohio Supreme Court

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[3] In his brief to the Ohio Supreme Court, Petitioner raised the following propositions of law:

> 1. Instructing the jury in the penalty phase on nineteen separate aggravating circumstances to four aggravated murder charges where there were but three killings destroys the reliability of the sentencing procedure in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9,10, and 16, Article I, of the Ohio Constitution.
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> 2. The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution guarantee the accused the rights to cross-examine witnesses, have testimony adduced only when under oath, and to not be subjected to prosecutorial misconduct. The prosecutor's repeated testimony which was not subject to cross-examination nor under oath

concerning appellant's sexual preferences, political beliefs and uncharged acts of misconduct violates these constitutional guarantees.

3. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the effective assistance of counsel at trial. The assistance of counsel appellant received at the guilt phase of trial failed to reach the minimum standard as established by the Ohio and federal Constitution.

4. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9, 10 and 16 of the Ohio Constitution; and Ohio Revised Code Section 2945.1 1 guarantee the accused a jury charge that instructs the jury as to the defense theory of the case. The failure of the trial court to instruct the jury as to the insanity defense violated these constitutional and statutory protections.

5. The trial judge denied appellant's Fourteenth Amendment right to due process, his Fifth Amendment right to a fair trial and his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor by usurping the jury's fact-finding function and excluding all expert evidence of insanity.

6. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Ohio Evidence Rule 70 I; and Article I, Sections 10 and 16 of the Ohio Constitution guarantee the accused a right to a fair trial and the right to adduce testimony on his own behalf. The trial court's refusal to permit lay testimony as to

appellant's insanity denied appellant these rights.

7. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee the accused a right to a fair trial at which he can testify on his own behalf. The trial coui1's refusal to permit appellant's testimony as to his delusional beliefs concerning God and his grandiose thoughts about his guns denied appellant these rights.

8. The Fifth and Fourteenth Amendments of the United States Constitution; Article I, Section 16 of the Ohio Constitution, and Ohio Revised Code Section 2940.02 guarantee an accused that a trial will be conducted in a fair manner in which the trial court bases its rulings upon the evidence and does [sic] comment to the jury concerning the credibility of the evidence. The trial court's exclusion and striking, in the presence of the jury of the expert's testimony which it had previously ruled admissible only after a lengthy voir dire, violated these constitutional guarantees.

9. The Fourteenth Amendment to the United States Constitution; Article I, Section 16 of the Ohio Constitution; and Ohio Revised Code Section 2929.05 require that the trial court keep a complete and full transcript of all proceedings occurring during the trial court. The trial court's failure to maintain such a record during the voir dire and pretrial motions denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

10. The Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee an accused the right of due process of law. The trial court erred

when it placed upon appellant the burden of proof and the burden of going forward on appellant's motion to suppress evidence, which denied appellant his constitutional guarantees.

11. The Fourth Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment; and Article I, Section 14 of the Ohio Constitution prohibits the police from making a warrant less and non-consensual entry into a suspect's home. The trial court's failure to suppress evidence obtained in a warrant less and non-consensual entry into appellant's home denied appellant his rights guaranteed by the United States and Ohio Constitutions.

12. The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment; and Article I, Section 14 of the Ohio Constitution prohibit the police from making a warrantless and non-consensual entry into a third party's home without first obtaining a search warrant. The testimony and exhibits received into evidence by the court which had been obtained by the illegal entry into Ronald Reddish's house denied appellant his rights as guaranteed by the United Stated and Ohio Constitutions.

13. The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution prohibit the police from making a warrantless and non-consensual search and seizure of an automobile. The evidence obtained from the warrantless search and seizure of Ronald Reddish's automobile denied appellant his rights as guaranteed by the United States and Ohio Constitutions.

14. The Eighth and Fourteenth Amendments to the United States Constitution and Sections 19

and 16, Article I, of the Ohio Constitution protect an accused against the infliction of cruel and unusual punishment and guarantee an accused due process of law. The trial court's and prosecutor's repeated comments to the jury that the jury's death penalty verdict was only a recommendation and not binding upon the trial judge violated appellant's rights as guaranteed by the United States and Ohio Constitutions.

15. The Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10 and 16 of the Ohio Constitution and Section 2945.25(C) of the Ohio Revised Code guarantee an accused a fair trial and impartial jury. The trial court's exclusion of potential juror Thomas J. Schmitt, over defense counsel's objection denied appellant these constitutional guarantees.

16. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution require that jurors decide the case based upon evidence and testimony received inside the courtroom and not from conversation occurring outside the court room. The trial court's failure to sequester and admonish the potential jurors in the present case denied appellant his rights as guaranteed by the United States and Ohio Constitutions.

17. The Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution require the presence of the defendant at all stages of the trial absent compelling circumstances. The trial court's failure to have appellant present for the excusal for cause of jurors violated such rights.

18. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 10 and 16 of the Ohio

Constitution guarantee an accused a right to a fair and impartial trial by jury. The ineffective assistance of counsel which appellant received during the jury selection process resulted in a denial of appellant's constitutional right to a fair and impartial trial by jury.

19. The Eighth and Fourteenth Amendment of the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution require that the jury impose the death penalty only when it is the appropriate penalty. The prosecutor's comments during voir dire that the jury must return such penalty when the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt violated such rights.

20. The Fourteenth Amendment to the United States Constitution; Article I, Section 16 of the Ohio Constitution; and Ohio Revised Code Section 2929.05 require that the trial court keep a complete and full transcript of all proceedings occurring in the trial court. The trial court's failure to maintain such a record of the jury view denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

21. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee a defendant a right to a fair trial. The trial court abused its discretion and denied appellant a fair trial by allowing the appellant to appear before the jury in shackles.

22. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee an accused a right to a fair trial. The trial court

denied appellant his fair trial when he failed to give the jury an instruction on shackling.

23. The Fourteenth Amendment to the United States Constitution; Section 16, Article I, of the Ohio Constitution; and R.C. 2929.05 require the trial court to keep a complete record of all proceedings and its failure to maintain such a record during the guilt phase denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

24. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by calling Clem H. Sharkey, a friend and relative of the victim, Reverend Horace Rickerson, interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and, therefore, violated the above cited constitutional principles.

25. The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by adducing testimony from the victim John Hardaway concerning his background and the extreme pain that the shooting caused him interjected sympathy and passion into the judicial process, thereby violating the above cited constitutional principles.

26. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution guarantee an accused a fair trial

whose outcome will be as free as possible from bias and sympathy. The State of Ohio, by calling Kathleen Sheehan, the wife of the victim, Timothy Sheehan, interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and, therefore, violated the above cited constitutional principles.

27. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee a defendant a right to a fair trial. The trial court denied appellant a fair trial when it permitted the State of Ohio to elicit testimony from witness Charles Ronkas, the sole effect of the testimony was to elicit sympathy for the victim and to add no probative evidence to the elements of the crimes for which appellant was indicted.

28. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by calling Barbara Chapman, the employer of the victim, Brian T. Warford, interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and, therefore, violated the above cited constitutional principles.

29. The Fifth and Sixth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution and Ohio Evidence Rule 802 guarantee a defendant the right to a fair trial through the right of cross examination of the state's witnesses. The trial court's admission of the results of the toxicologist's

reports as to Horace Rickerson violated these rights guaranteed by the Ohio and United States Constitution and Ohio Rules of Evidence.

30. The Fifth and Sixth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution and Ohio Evidence Rule 802 guarantee a defendant the right to a fair trial through the right of cross-examination of the state's witnesses. The trial court's admission of the results of the pathologist's reports as to Timothy Sheehan violated these rights guaranteed by the Ohio and United States Constitutions and Ohio Rules of Evidence.

31. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution, guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by requesting that pathologists speculate as to the order the bullets struck the victim and the impact each bullet had upon each victim interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and thereby violated the above cited constitutional principles.

32. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative pictures into evidence when the prejudicial effect of these pictures clearly outweighed the probative value.

33. The Fifth and Fourteenth Amendments to the United States Constitution, Section 2945.35 of the Ohio Revised Code, and Article I, Section 16 of the Ohio Constitution guarantee the accused the right to a fair trial. The trial court's failure to exclude from the jury's consideration evidence which the trial court had already ruled was inflammatory and prejudicial violated appellant's rights as guaranteed by the federal and Ohio Constitutions and 2945.35 of the Ohio Revised Code.

34. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative testimony concerning the death of Horace Rickerson when it was clear that the prejudicial effect of this testimony outweighed the probative value.

35. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative testimony concerning the death of Timothy Sheehan when it was clear that the prejudicial effect of this testimony outweighed the probative value.

36. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The

trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative testimony concerning the death of Brian Warford when it was clear that the prejudicial effect of this testimony outweighed the probative value.

37. The Fifth and Sixth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution and Ohio Evidence Rule 802 guarantee a defendant the right to a fair trial through the cross-examination of the state witnesses. The trial court's admission of the testimony of Theodore Budzik concerning the contents of a telephone conversation he had with an unidentified informant violated these rights as guaranteed by the Ohio and United States Constitutions and the Ohio Rules of Evidence.

38. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of appellant by admitting testimony concerning appellant's prior acts of shooting out the window of his apartment.

39. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantees an accused the right to due process of law and a fair trial. The trial court's admission of testimony concerning firearms which were found among the belongings of appellant, but said weapons were not connected to the crimes for which appellant was charged, violated the above cited

constitutional provisions and Ohio Evidence Rules 401, 402, and 403.

40. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantees an accused the right to due process of law and a fair trial. When a trial court allows testimony and evidence to be presented concerning property of the defendant, such as an anarchist cookbook which is inflammatory and prejudicial, violated the above cited provisions and Ohio Evidence Rules 401, 402, and 403.

41. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 and 16 of the Ohio Constitution guarantee an accused the right to a fair trial and due process of law. The trial court's repeated admission of prior uncharged acts of assaultive conduct by appellant violated these rights.

42. The Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution, guarantee the accused the right to a fair trial and that the state will not suppress exculpatory or favorable evidence. The State of Ohio's suppression of evidence that Betty Braun was unable to select Ronald Reddish in a lineup was a violation of such constitutional guarantees.

43. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee that a custodial statement not be admitted in court unless the accused, prior to giving such statement has been informed of his *Miranda* rights. The admission

of appellant's statement to Dr. Resnick violated such rights.

44. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee that an accused's post-arrest silence will not be used against him. When a prosecutor deliberately tells the jury that the accused exercised his *Miranda* right to remain silent, the accused's constitutional guarantees are violated.

45. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused a right to a fair trial and a right to confront witnesses. When a prosecutor testifies on his own and allows a witness to testify, without being sworn, the above cited rights are violated.

46. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution guarantee the accused the rights to cross-examine witnesses, have testimony adduced only when under oath, and to not be subjected to prosecutorial misconduct. The prosecutor's repeated testimony which was not subject to cross-examination nor under oath concerning appellant's political beliefs violates these constitutional guarantees.

47. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the right to a fair trial and due process of law. The trial court's repeated admission of prior uncharged acts of assaultive conduct by appellant toward his wife violated these rights.

48. The Fourteenth Amendment to the United States Constitution; Section 16, Article I, of the Ohio Constitution; and R.C. 2929.05 require the trial court to keep a complete record of all proceedings. Its failure to maintain such a record during the mitigation phase denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

49. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee the defendant a fair trial free from prosecutorial misconduct. The repeated statements in the mitigation phase by the prosecutor that were not supported by the evidence violated these rights.

50. The defense has the burden of going forward with evidence at the penalty phase of a capital trial. The state may then only rebut specific evidence presented by the defense in mitigation. Where the state presents irrelevant and inflammatory evidence that does not rebut any evidence presented in mitigation, the delicate balancing system is upset and the reliability of the sentencing procedure is destroyed in violation of the Eighth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Ohio Constitutions.

51. Failing to instruct the jury concerning the appellant's constitutional right not to testify at the penalty phase, denied appellant's rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

52. Jury instructions that permit a finding of death where "you are firmly convinced of the

truth of the charge" destroy the reliability of the sentencing procedure in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

53. Charging the jury at the penalty phase that it could consider any factor it desired in determining the appropriate penalty violated appellant's rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

54. Jury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

55. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution guarantee the accused a fair trial and freedom from cruel and unusual punishment. The trial court's instruction in the mitigation phase prohibiting consideration of mercy and sympathy violated such rights.

56. Ohio's mandatory sentencing scheme prevented the jury from deciding whether death was the appropriate punishment in violation of appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I. of the Ohio Constitution.

57. Appellant was denied effective assistance of counsel in the mitigation portion of the trial as

guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

58. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the right to a fair trial and to the effective assistance of counsel. When defense counsel fails to preserve error he is denied effective assistance of counsel as guaranteed by the above constitutional provisions.

59. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 10 and 16 of the Ohio Constitution guarantee an accused the right to effective assistance of counsel when entering a no contest plea. The assistance of counsel which appellant received when entering his no contest plea to attempted murder did not fall within the range of professionally acceptable conduct and thereby appellant was deprived of his right to effective assistance of counsel.

60. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee a convicted defendant a right to a fair appeal and effective assistance of counsel when such appeal is an appeal-of-right. The Eighth District Court of Appeals steadfast refusal to permit counsel for appellant to raise and brief any issues on either the first or second remand from the Ohio Supreme Court of this case violated such rights.

61. Appellant's original counsel by raising only a single issue in appellant's initial appeal violated appellant's rights as guaranteed by the Fifth,

affirmed Spisak's conviction. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988). Spisak then petitioned the United States Supreme Court for a writ of certiorari,

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Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

62. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 and 16 of the Ohio Constitution and Ohio Revised Code Section 2929.05 guarantee a convicted defendant a fair and impartial review of his death sentence. The statutorily mandated proportionality process in Ohio is fatally flawed thereby denying appellant the above rights.

63. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 9 and 16, Article I, of the Ohio Constitution and Revised Code Section 2929.05 guaranteed that the sentence imposed in a capital trial will be reliable. When both the guilt and mitigation phases of a capital trial are replete with errors, the sentence of death is unreliable and inappropriate.

64. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10 and 16 establish the requirements for a valid death penalty scheme. Ohio Revised Code Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 929.04, 2929.05, Ohio's statutory provisions governing the imposition of the death penalty do not meet the prescribed requirements and, thus, are unconstitutional, both on their face and as applied to appellant.

but his petition was denied.[4] *Spisak v. Ohio*, 489 U.S. 1071 (1989).

On November 1, 1989, Spisak filed a petition for post-conviction relief pursuant to Ohio Rev. Code § 2953.21.[5] The trial court denied Spisak relief on

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[4] Spisak raised the following two claims to the United States Supreme Court:

> 1. Whether the Ohio Supreme Court's Failure to review any of the errors presented to it by a capitally convicted appellant, although review is required by Ohio Statute, constitutes a violation of the Eighth and Fourteenth Amendments and is contrary to this Court's rulings in *Gregg v. Georgia* and its progeny.
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> 2. Whether an instruction, although "technically" accurate, stressing the preliminary nature of a jury's decision of a death sentence in a capital case so misleads a jury about the importance of its decisions and diminishes its sense of responsibility for that decision as to increase the likelihood of a death verdict, thereby destroying the reliability of sentencing procedure is unconstitutional.

[5] After amending his petition four times, Spisak raised the following causes for relief:

> 1. The judgment against Petitioner Spisak is void or voidable because the trial court instructed the Petitioner's jury in the penalty phase of Petitioner's trial on nineteen (19) separate aggravating circumstances to four aggravated murder charges when there were only three murders, thus destroying the reliability of the sentencing proceedings in violation of Petitioner's constitutional rights as guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution

and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

2. The judgment against Petitioner Spisak is void or voidable because he was denied his constitutional rights to a fair trial, an impartial jury and the effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 5, 10 and 16,

Article I of the Ohio Constitution when Petitioner's trial counsel failed to move the trial court for a change of venue and further failed to conduct voir dire of potential jurors to detenl1ine the impact and influence of the inflammatory and pervasive publicity attendant on potential jurors.

3. The judgment against Petitioner Spisak is void or voidable due to the error committed by the trial court in placing the burden of proof and the burden of going forward upon the Petitioner during a hearing on his motion to suppress evidence thereby violating Petitioner's rights as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Sections 14 and 16, Article I of the Ohio Constitution.

4. The judgment against Petitioner Spisak is void or voidable because evidence used against him during his trial was obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Sections 14 and 16, Article I of the Ohio Constitution.

5. The judgment against Petitioner Spisak is void or voidable because the arrest of the Petitioner and evidence obtained during the arrest violated the requirements of the Fourth and Fourteenth Amendments of the United

States Constitution and Sections 14 and 16, Article I of the Ohio Constitution.

6. The judgment against Petitioner Spisak is void or voidable due to the illegal seizure and search of the 1975 Buick LeSabre.

7. The judgment against Petitioner Spisak is void or voidable because the trial court's and prosecutor's repeated comments to the jury that the jury's death penalty verdict was only a recommendation and not binding upon the trial judge violated the Petitioner's constitutional rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

8. The judgment against Petitioner Spisak is void or voidable because he was deprived of a fair trial and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution due to the trial court's exclusion of potential juror Thomas J. Schmitt.

9. The judgment against Petitioner Spisak is void or voidable due to the trial court's failure to sequester and admonish potential jurors.

10. The judgment against Petitioner Spisak is void or voidable because the trial court failed to ensure that Petitioner Spisak was present when jurors were excused for cause. (VD Tr. 411-416.)

11. The judgment against Petitioner Spisak is void or voidable because the jury's determination that death was appropriate in his case was impermissibly influenced by the prosecutor's comments during voir dire that the jury must return such penalty when the aggravating circumstances outweigh the

mitigating factors beyond a reasonable doubt in violation of Petitioner's rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

12. The judgment against Petitioner Spisak is void or voidable due to the failure of the trial court to have the jury view recorded.

13. The judgment against Petitioner Spisak is void or voidable because the trial court abused its discretion by allowing Petitioner to appear before the jury in shackles in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

14. The judgment against Petitioner Spisak is void or voidable due to the trial court's failure to insure that the jury's deliberations and verdict remained untainted by instructing the jury regarding the shackling of Petitioner.

15. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim Horace Rickerson.

16. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim John Hardaway.

17. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim Timothy Sheehan.

18. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim Brian Warford.

19. The judgment against Petitioner Spisak is void or voidable because Petitioner was denied his right to confrontation when the coroner testified concerning a toxicologist examination she did not perform.

20. The judgment against Petitioner Spisak is void or voidable because Petitioner was denied his right to confrontation when a coroner who had not performed the autopsy on Timothy Sheehan testified as to the autopsy.

21. The judgment against Petitioner Spisak is void or voidable due to the introduction of bias and prejudice into the proceedings in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

22. The judgment against Petitioner Spisak is void or voidable due to the introduction of eighty-one gruesome pictures during his trial.

23. The judgment against Petitioner Spisak is void or voidable because Petitioner's right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution was violated due to the trial court's failure to exclude from the jury's consideration evidence that the trial court had already ruled was prejudicial and inflammatory.

24. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial and cumulative testimony concerning the death of Horace Rickerson.

25. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial and cumulative testimony concerning the death of Timothy Sheehan.

26. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial and cumulative testimony concerning the death of Brian Warford.

27. The judgment against Petitioner Spisak is void or voidable due to the use of hearsay information by the State.

28. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial evidence concerning prior acts committed by Petitioner.

29. The judgment against Petitioner Spisak is void or voidable due to the admission of testimony concerning firearms that were found among the Petitioner's belongings and unrelated to any of the crimes Petitioner was charged with.

30. The judgment against Petitioner Spisak is void or voidable due to the admission of irrelevant and prejudicial evidence admitted against Petitioner.

31. The judgment against Petitioner Spisak is void or voidable due to the admission of testimony concerning uncharged acts of assaultive conduct by Petitioner.

32. The judgment against Petitioner Spisak is void or voidable due to the State of Ohio's withholding of exculpatory or favorable evidence.

33. The judgment against Petitioner Spisak is void or voidable because he was denied the right to testify on his own behalf as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

34. The judgment against Petitioner Spisak is void or voidable because prosecutorial misconduct denied him the right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

35. The judgment against Petitioner Spisak is void or voidable due to the admission of Petitioner's post-arrest silence at his trial against him.

36. The judgment against Petitioner Spisak is void or voidable when the prosecutor testified without being sworn and allowed a witness to testify without being sworn.

37. The judgment against Petitioner Spisak is void or voidable because his rights to cross-examine witnesses and have testimony adduced only under oath as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution were violated by the prosecutor's repeated testimony which was not subject to cross-examination or under oath concerning Petitioner's political beliefs.

38. The judgment against Petitioner Spisak is void or voidable because the trial court usurped the jury's fact-finding function by excluding all expert evidence of insanity therefore denying Petitioner his rights to due process, a fair trial and compulsory process for obtaining witnesses in his favor as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

39. The judgment against Petitioner Spisak is void or voidable because he was deprived of his

right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution when the trial court excluded and struck, in the presence of the jury, expert testimony that the court had previously ruled admissible after concluding a lengthy examination of the expert out of the presence of the jury.

40. The judgment against Petitioner Spisak is void or voidable because he was denied the right to a fair trial and to compulsory process as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

41. The judgment against Petitioner Spisak is void or voidable due to the introduction of evidence through cross-examination by the prosecutor concerning uncharged acts of assaultive conduct.

42. The judgment against Petitioner Spisak is void or voidable due to the admission of statements made to a psychiatrist without the benefit of *Miranda* warnings.

43. The judgment against Petitioner Spisak is void or voidable because he was denied a fair trial when the trial court failed to instruct the Petitioner's jury as to the insanity defense which constituted the defense theory of Petitioner's case in violation of Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

44. The judgment against Petitioner Spisak is void or voidable because he was denied a fair

trial free from prosecutorial misconduct as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution due to the repeated statements in the mitigation phase by the prosecutor that were not supported by the evidence.

45. The judgment against Petitioner Spisak is void or voidable because at the mitigation phase of Petitioner's trial the State presented inflammatory and irrelevant evidence that did not rebut any evidence presented in mitigation, upset the delicate balancing system and destroyed the reliability of the sentencing determination in violation of Petitioner' s rights under the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 10, Article I of the Ohio Constitution.

46. The judgment against Petitioner Spisak is void or voidable because the trial court failed to instruct the jury concerning the Petitioner's constitutional right not to testify at the mitigation phase as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

47. The judgment against Petitioner Spisak is void or voidable because the jury at Petitioner's trial was given an instruction that permitted a finding of death where the Petitioner's jury was "firmly convinced of the truth of the charge" thus destroying the reliability of the sentencing procedure in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16, Article I of the Ohio Constitution.

48. The judgment against Petitioner Spisak is void or voidable because the jury in his case, at

the penalty phase, was charged that it could consider any factor it desired in determining the appropriate penalty in violation of Petitioner's rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

49. The judgment against Petitioner Spisak is void or voidable because the trial court instructed Petitioner's jury at the penalty phase of Petitioner's trial that the jury's recommendation as to a sentence had to be unanimous.

50. The judgment against Petitioner Spisak is void or voidable because the trial court's instruction at the mitigation phase of the trial, prohibiting the jury from considering mercy or sympathy, violated Petitioner's rights to a fair trial and freedom from cruel and unusual punishment pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article 1 of the Ohio Constitution.

51. The judgment against Petitioner Spisak is void or voidable because the trial court failed to keep a complete and full transcript of all proceedings occurring in the trial court thus violating Petitioner's constitutional rights as guaranteed under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

52. The judgment against Petitioner Spisak is void or voidable because the Petitioner was denied the effective assistance of counsel at all phases of his capital trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

53. The judgment against Petitioner Spisak is void or voidable due to the mandatory nature of Ohio's capital statute.

54. The judgment against Petitioner Spisak is void or voidable because instructions given to the jury in the penalty phase of his capital trial misled the jury as to its sentencing role and the scope of its discretion.

55. The judgment against Petitioner Spisak is void or voidable because Petitioner was denied the effective assistance of counsel when he entered a no contest plea to the charge of attempted murder of John Hardaway in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 5, 10, and 16, Article I of the Ohio Constitution.

56. The judgment against Petitioner Spisak is void or voidable because he was denied his right to the effective assistance of counsel when Petitioner's original counsel raised only a single issue in Petitioner's initial appeal in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I of the Ohio Constitution.

57. The judgment against Petitioner Spisak is void or voidable because he was denied the effective assistance of counsel on his appeal of right when the Eighth District Court of Appeals refused to permit the Petitioner's counsel to raise and brief any issues on either the first or second remand from the Ohio Supreme Court in Petitioner's case and the Ohio Supreme's Court failure to address any of the issues raised there in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution

and Sections 9, 10 and 16, Article I of the Ohio Constitution.

58. The judgment against Petitioner Spisak is void or voidable because he was denied a fair and impartial review of his death sentence as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

59. The judgment against Petitioner Spisak is void or voidable due to the failure of the Ohio Supreme Court to provide the level of review constitutionally required in capital cases by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

60. The judgment against Petitioner Spisak is void or voidable because the guilt and mitigation phases of his trial were replete with errors, making his sentence of death unreliable and inappropriate in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution. The errors and failures of counsel, the prosecutor, and the trail court were left uncorrected and were compounded by counsel's failures in the Court of Appeals, by the Court of Appeals' refusal to permit new counsel to raise errors on the two remands, and by the failure of the Ohio Supreme Court to give this case any more than a cursory and arbitrary review. The judicial system failed to give Frank Spisak a fair trial, a reliable sentencing determination, a fair review to insure against the arbitrary and capricious imposition of the death sentence, either in the Court of Appeals or the Ohio Supreme Court.

Any death sentence imposed as the result of these numerous failures throughout the judicial system can never be deemed appropriate.

61. The Ohio death penalty scheme is unconstitutional on its face in violation of the United States Constitution and Ohio Constitution.

61(a). The death penalty violates the prohibition under the Eighth Amendment to the United States Constitution against cruel and unusual punishment and Section 9, Article I of the Ohio Constitution.

61(b). The death penalty in Ohio is applied in an arbitrary and capricious fashion since it permits prosecutors to exercise discretion in deciding who will be charged with capital offenses.

61(c). The Ohio death penalty scheme fails to require premeditation or deliberation as the culpable mental state for defendants in all capital cases.

61(d). R.C. 2929.03 sets forth no standard of proof to be applied in determining mitigating factors.

61(e). R.C. 2020.03 fails to give the jury a standard with which to balance mitigating factors against the aggravating circumstances.

61(f). The consideration of aggravating circumstances at the guilt phase of the trial is unconstitutional.

61(g). R.C. 2020.03 and 2929.04 are unconstitutional in that they treat felony murders more harshly than premeditated murder.

61(h). The Ohio death penalty scheme is unconstitutional in that it does not give the

sentencing authority the option to impose a life sentence, or give mercy, when it finds that the aggravating circumstances outweigh the mitigating factors.

61(i). The Ohio death penalty scheme is unconstitutional because a bifurcated trial with the same jury denies the defendant an impartial jury and the effective assistance of counsel.

61(j). The Ohio death penalty scheme is unconstitutional because in conjunction with Crim. R. 11(C)(3), it encourages defendants to waive their fundamental rights and enter guilty pleas.

61(k). The Ohio death penalty scheme totally eliminates sentencing discretion.

61(l). The Ohio death penalty scheme is unconstitutional because it mandates that a jury must recommend death if it finds that the aggravating circumstances outweigh the mitigating factors at the sentencing phase of the trial.

61(m). The Ohio death penalty scheme fails to provide equal protection to persons convicted of the same or similar crimes.

61(n). The Ohio death penalty is applied in an arbitrary and discriminatory manner.

61(o). The Ohio death penalty is unconstitutional because Ohio has failed to show a legitimate and compelling state interest in executing persons.

61(p). The Ohio death penalty statute is unconstitutional because the statute impermissibly devalues the importance of mitigation because no method exists to ensure a proper "weighing and consideration" is accomplished.

June 12, 1992, *State v. Spisak*, No. CR 181411, slip op. (Ohio Ct. Common Pleas June 11, 1992). The Court of Appeals affirmed the trial court's decision. *State v. Spisak*, No. 67229, 1995 WL 229108 (Ohio Ct. App. Apr. 13, 1995). Thereafter, Spisak attempted to file an application to re-open his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B). The Court of Appeals determined, however, that Spisak could not demonstrate "good cause," required under the statute, for filing his application more than ninety days after the journalization of his direct appeal. *State v. Spisak*, 652 N.E.2d 719 (Ohio Ct. App. 1995). Thus, the Court of Appeals denied Spisak's application.

Spisak next filed a Notice of Intent to file a petition for writ of habeas corpus with this court on

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61(q). The Ohio death penalty statute is unconstitutional because it requires a defendant to prove mitigation by a preponderance of evidence.

61(r). The Ohio death penalty statutes are unconstitutional because of the arbitrary and capricious application of appellate review procedures by the Courts of Appeals and Ohio Supreme Court resulting in no meaningful appellate review.

61(s). To execute the Petitioner pursuant to a death sentence secured under an unconstitutional death penalty scheme would be prejudicial to Petitioner and would violate the Eighth Amendment and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

December 15, 1995 (Doc. No. 1). After filing the Petition, Spisak moved the court to stay his execution on June 13, 1997 (Doc. No. 54). The court granted the motion (Doc. No. 60).

II. FACTS

When the Ohio Supreme Court considered Spisak's direct appeal, it set out the factual history the case as revealed by the evidence adduced at Spisak's trial. *State v. Spisak*, 521 N.E.2d 800, of 800-01 (Ohio 1988). This court repeats that factual history here, using the Ohio Supreme Court's language.

> On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.
>
> On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting, and was later able to identify his assailant as Petitioner, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.

At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered Spisak, holding a gun, who ordered her back into the stall. Instead, Dartt shoved Spisak out of the way and ran down the hallway. Spisak shot at her, but missed. A pellet was later removed from a wall in the hallway. Dartt identified Spisak as her assailant.

On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing

shots from a window at 1367 East 53rd Street. The police were directed to Spisak's apartment and Spisak, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic pistol were observed in the room. Spisak made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a two-shot derringer under the couch cushions. Spisak was arrested for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Spisak was later arrested, hiding in the basement of a friend's house. During a brief search of Spisak's suitcase at the scene, police discovered the beeper pager belonging to Sheehan.

Spisak later admitted to shooting Rickerson for allegedly making homosexual advances toward him; to

killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and, finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder weapon.

Spisak was brought to trial under an eight-count indictment containing twenty specifications, including the aggravated murders of Rickerson, Sheehan and Warford and appurtenant death specifications. Spisak pleaded not guilty and not guilty by reason of insanity, claiming to be a follower of Adolf Hitler. He was found to have been competent, however, at the time of the acts, and the jury returned guilty verdicts on all counts and specifications, except the alleged aggravated robbery of Warford.

Following the mitigation hearing, the jury recommended that the sentence of death be imposed. In a separate opinion, the trial court concurred, imposing a death sentence. Spisak was also sentenced to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

III. STANDARD OF REVIEW

Before considering the specific grounds for relief Spisak raised in the Petition, the court must determine whether the amendments to § 2254, requiring greater deference to state court decisions, apply to this case. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132 § 104, amending 28 U.S.C. § 2254 became effective on April 24, 1996. On September 3, 1997, this court determined that the amendments to 28 U.S.C. § 2254 et seq. were inapplicable to the instant case because the case was pending before the court before the AEDPA's effective date (Doc. No. 72). This court based its decision on *Lindh v. Murphy*, 521 US. 320 (1997), in which the United States Supreme Court held that amended §2254(d) does not apply to habeas corpus cases that were "pending" when the AEDPA was passed. This court determined that a habeas case commenced when the Petitioner filed a notice of intent to file a petition. Thus, this court concluded, because Spisak had filed this Notice of Intent on December 15, 1995, (Doc. No. 1), the case was "pending" at the time of the AEDPA's enactment, and, therefore, the AEDPA was inapplicable.

In the same Order, the court determined that Section 107 (Chapter 154) of the AEDPA is not applicable to this proceeding because Ohio is not an "opt-in" state as defined by the terms of that Chapter (Doc. No. 72). Specifically, Ohio does not qualify as an "opt-in" state because it does not comply with the provisions of 28 U.S.C. § 2261, which requires a mechanism for appointment, compensation and

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payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by an indigent prisoner. 28 U.S.C. § 2261(b).

Since the court issued that Order, however, the Sixth Circuit decided that a habeas corpus case commences with the filing of the petition. *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999). To determine what constitutes a "pending" habeas case for purposes of applying the AEDP A, the Sixth Circuit first determined that the word must be given its ordinary meaning. *Id.* at 1 038 (citing *Moskal v. United States*, 498 US. 103, 108 (1990)). Noting the similarities between the filing of a habeas petition and the filing of a civil complaint, the court noted that Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

The Sixth Circuit also looked to the language contained in § 2254 to support its finding. Specifically, §2254(e) refers to "a proceeding instituted by an application for a writ of habeas corpus." Moreover, Section 1914(a) of Title 28 provides that the "district court shall require the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of $150, except that on an application for a writ of habeas corpus the filing fee shall be $5." Thus, the statutes associate the commencement of a habeas corpus proceeding with the filing of the application or petition. Consequently, the Sixth Circuit determined that a habeas case "commences" when the petition is filed. Thus, for purposes of applying the AEDPA, a case

may be "pending" only after it has been commenced by the filing of the petition. *Id.*

In the instant case, Spisak filed his Petition on April 9, 1997, (Doc. No. 19), almost a year after the AEDPA's effective date. In a previous Order, (Doc. No. 124), the court noted that the Williams decision required the court to amend its previous determination. While the court will utilize the AEDPA's statutory amendments to 28 U.S.C. § 2254 et seq. as found in Chapter 153, the court's prior determination that Ohio is not an "opt-in" state remains unaltered. Thus, Chapter 154 is inapplicable to this case.

The analysis does not end, however, with the determination that Chapter 153 of the AEDPA is the applicable standard to utilize. The court next must determine what level of deference to give to the Ohio Supreme Court's brief opinion. On April 13, 1988, the Ohio Supreme Court affirmed Spisak's conviction and sentence. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988). After reciting the facts adduced during trial, the Ohio Supreme Court addressed the merits of Spisak's claims. Noting that many of Spisak's claims were "time-worn legal arguments raised in a multiplicity of printed pages," the court addressed Spisak's sixty-four claims in a two-page, summary fashion. *Id.* at 801-02.[6] The Ohio Supreme Court

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[6] Although the court will not reproduce the two pages addressing the claims here, the court notes, for purposes of illustration, the manner in which the Ohio Supreme Court addressed seven of Petitioner's sixty-four claims below:

> In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four,

then concluded that none of Spisak's claims had merit. The court went on to re-weigh independently the statutory mitigating factors and aggravating circumstances, concluding that Spisak's death sentence was appropriate. *Id.* at 803-04.

The AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The relevant statute states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable

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appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins*, (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E.2d 264, certiorari denied (1985), 472 U.S. 1032, 105 S. Ct. 3514, 87 L.Ed.2d 643; *Maurer, supra*; *State v. Buell*, (1986), 22 Ohio St.3d 124,22 OBR 203, 489 N.E.2d 795, *certiorari denied*, (1986), 479 U.S. 871,107 S. Ct. 240, 93 L.Ed.2d 165; *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13,490 N.E.2d 906, certiorari denied (1987),480 U.S. 923, 107 S. Ct. 1385,94 L.Ed.2d 699; and *State v. Steffen* (1987), 21 Ohio St. 3d 111,31 OBR 273,509 N.E.2d 383.

Spisak, 521 N.E.2d at 802.

> application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). Recently, the United States Supreme Court interpreted this statute in *Williams v. Taylor*, 529 U.S. 362 (2000). According to Justice O'Connor, a habeas court may grant relief only if "the state court identifies the correct governing legal rule from this Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case" or if the state court "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* 407. A fragmented Court also determined the "unreasonable application" language to mean something more than merely the state court's incorrect application of federal law. *Id.* at 411. While the *Williams* case was instructive to habeas courts in its interpretation of § 2254(d), it is not of practical guidance in a case such as this where the state court opinion lacks substantial analysis upon which a

federal habeas court can analyze the application of law for "reasonableness."

Initially, the court notes that the Ohio Supreme Court opinion, while decidedly brief, was an "adjudication on the merits" pursuant to § 2254(d). Courts deciding habeas cases involving a state court's summary review have determined that a summary review is not "indicative of a cursory or haphazard review of a petitioner's claims." *Wright v. Angelone*, 151 F3d 151, 157 (4th Cir. 1998). Thus, Spisak cannot escape the purview of the AEDPA on this basis.

The Sixth Circuit recently determined in *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001), that when reviewing a summary state court opinion, a habeas court is "obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." In that case, the Michigan Court of Appeals summarily issued an order granting the State's motion to affirm the conviction on appeal. *Id.* The Michigan Supreme Court denied the petitioner leave to appeal the Court of Appeals' decision. *Id.*

After reviewing the standards employed by other circuits for evaluating summary state court opinions, the Sixth Circuit determined that it would conduct an independent review of the petitioner's habeas claims. It went on to note: "[t]hat independent review, however, is not a full, *de novo*

review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.* The court then applied the two-step approach of conducting an independent review then subjecting the state court holding to the "reasonableness" review that the AEDP A mandates.

Thus, if a habeas court determines that a petitioner has not demonstrated a constitutional violation in regard to a particular claim, then it must necessarily determine that a state court decision denying such a claim was not "unreasonable." If it determines that the petitioner's claim has merit and a constitutional violation occurred, then the habeas court must defer to the state court decision unless it was "unreasonable." This court will, thus, subject the claims in Spisak's Petition to an independent review. Thereafter, the court will determine if the state court holding was "reasonable."

IV. EXHAUSTION AND PROCEDURAL DEFAULT

A. Exhaustion

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509 (1982). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on the claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If under state law there remains a remedy that petitioner has not yet

pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust*, 17 F .3d at 160.

B. Procedural Default

The Respondent argues that Spisak is precluded from raising "any claims brought in his post-conviction petition that are separate or different from his claims brought on direct appeal. . . ."[7]

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[7] The court notes that Respondent failed to assert procedural default as to each individual claim. Petitioner contends that because Respondent made only vague and broad assertions of procedural default without specifically alleging why each claim is defaulted, he has waived the right to assert this defense as to all claims.

In *Trest v. Cain*, 522 U.S. 87 (1997), the Supreme Court addressed the question of whether a court must raise the issue of procedural default *sua sponte* even where the State has failed to assert it as a defense to a petitioner's claims. The Court held that because it is not jurisdictional, "procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Id.* at 89 (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996)). It therefore concluded that a court reviewing a habeas petition is not required to *sua sponte* address whether a petitioner has procedurally defaulted his claims. In so deciding, the Court explicitly left open the question whether a court *may* raise the issue *sua sponte*, noting that there was disagreement in the lower courts on this matter. *Id.* at 90.

Several years after *Trest*, the Sixth Circuit in *Elzy v. United States*, 205 F.3d 882 (6th Cir. 2000), answered the question left open by the Supreme Court in the affirmative. *Id.* at 886 ("While procedural default is not a jurisdictional bar to review of such a claim, . . . and the Government's failure to raise the default may operate as a forfeiture of its right to defend on that ground, . . . we nonetheless may raise the[] issue *sua sponte*.") (citations omitted). Because Respondent did, in fact, raise the

Return of Writ at 30. Later in this opinion, the court will address the question of procedural default as to each individual ground for relief. Here, however, the court sets out the applicable law governing procedural default.

For purposes of comity, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

The Sixth Circuit Court of Appeals set out the analytical framework for determining the defaulted status of a claim. In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), it stated: "(w)hen a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated (four-prong) analysis." *Id.* at 138. Specifically, the Sixth Circuit stated:

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issue of procedural default, albeit in a somewhat vague and conclusory manner, the court here chooses to conduct a sua sponte procedural default analysis.

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court determines that a state procedural rule was not complied with and that rule was an adequate and independent state ground, then the petitioner must demonstrate. . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

Ohio Rule of Appellate Procedure 16(A)(3) requires an appellant to include in his brief a statement of the assignments of error presented for review. In *State v. Perry*, 226 N.E.2d 104 (Ohio 1967), the Ohio Supreme Court ruled that:

> Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense

> or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.

Id. at 108; *see also State v. Roberts*, 437 N.E.2d 598, 601 (Ohio 1982) (holding policy behind *Perry* bars post-conviction petitioners from raising issues that could have been raised on direct appeal in a collateral proceeding to avoid reversal of conviction based on collateral, rather than constitutional, issues).

V. GROUNDS FOR RELIEF RAISED IN THE PETITION

The Petitioner has raised thirty-three grounds for relief in the Petition. While the court will address each claim, certain claims will be grouped together as they raise similar legal or factual issues.[8] Spisak raised the following claims for relief in the Petition:

A. Grounds for Relief Related to Petitioner's Plea of Not Guilty by Reason of Insanity

> 1. Mr. Spisak was denied his right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the Trial Court, in the presence of the jury, excluded and struck from the record expert

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[8] The claims are grouped similar to the manner that they are presented in the Petition. The court has renumbered the groups as they were misnumbered in the Petition.

psychiatric testimony that the Court had previously ruled admissible.

2. When the Trial Court usurped the jury's fact finding function by excluding all expert evidence of insanity, mental disease or defect, it denied the Petitioner his rights to due process, a fair trial and compulsory process for obtaining witnesses in his favor as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3. Mr. Spisak was denied his right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the Trial Court denied the Petitioner the right to testify on his own behalf.

4. When, in spite of both expert and lay testimony as to Petitioner's insanity, the Trial Court refused to instruct the Petitioner's jury on the insanity defense, which constituted the Petitioner's sole theory of defense. Mr. Spisak was thereby denied his right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. Grounds for Relief Related to the Mitigation Phase

5. When the Trial Court instructed the jury in the penalty phase of Petitioner's trial on nineteen (19) separate aggravating circumstances to four aggravated murder charges arising out of three homicides, it destroyed the reliability of the sentencing proceedings, in violation of Petitioner's constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6.When, during his mitigation phase closing argument, Mr. Spisak's counsel repeatedly and emphatically stressed the brutality of the crimes, and scathingly demeaned Petitioner, counsel acted in direct conflict with his duty to loyally represent Petitioner. As a result Petitioner was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7. When the Trial Court improperly instructed Petitioner Spisak's jury at the penalty phase of the trial that the jury's recommendation as to sentence had to be unanimous, Petitioner was prejudiced and his right under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

8. When the Trial Court instructed Petitioner Spisak's jury at the penalty phase of the trial that the jury was prohibited from considering mercy or sympathy, Petitioner was prejudiced and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

9. When the Trial Court instructed Petitioner Spisak's jury at the penalty phase of the trial that the jury could consider any factor it desired in determining the appropriate penalty, Petitioner was prejudiced and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

10. Mr. Spisak was denied the effective assistance of counsel during the mitigation phase of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

11. When the State presented inflammatory and irrelevant evidence that did not rebut any evidence presented in mitigation, the State upset the delicate balancing system and destroyed the reliability of the sentencing determination. Petitioner was prejudiced and his rights under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution were violated.

12. When the Prosecutor repeatedly acted improperly in the mitigation phase of the Trial in clear effort to denigrate both the Petitioner, his mitigation that he suffered from a mental disease, and his witnesses, he was denied a fair trial free from prosecutorial misconduct as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

C. Grounds for Relief Relating to Petitioner's Appeals and Post-Conviction Review

13. When Petitioner's original appellate counsel raised only a single and solitary issue in Petitioner's initial appeal, counsel's performance was so seriously deficient that the attorneys were not functioning as counsel. As a result Petitioner was denied the right to the effective assistance of counsel in clear violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

14. When Mr. Spisak's trial counsel and the trial court failed to keep a complete and full transcript of all proceedings occurring in the trial, Petitioner was prejudiced and his rights as guaranteed under the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution were violated.

15. When the Eighth District Court of Appeals refused to permit the Petitioner's counsel to raise and brief any issues on either the first or second remand from the Ohio Supreme Court, and when the Ohio Supreme Court failed to address any of the issues raised in his appeal, Petitioner was denied the right to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

16. When the Ohio Supreme Court failed to provide the level of review constitutionally required in capital cases by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution the Petitioner's rights were violated.

D. Grounds for Relief Relating to Search and Seizure Evidence

17. When evidence which had been illegally gathered from Petitioner's residence and seized was introduced against the Petitioner during his trial Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

18. When evidence which had been illegally gathered and seized was introduced against Petitioner during his trial, Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

19. When evidence which had been illegally gathered and seized was introduced against the Petitioner during his trial, Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

E. Grounds for Relief Relating to "Other Acts" Evidence

20. When the Trial Court received testimony concerning various firearms that were found among the Petitioner's belongings, and these firearms were unrelated to any of the crimes with which the Petitioner was charged, Petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Evidence Rule 401, 402 and 403 were violated.

21. When the Trial Court received testimony concerning various items that were found among the Petitioner's belongings, and these items were unrelated to any of the crimes with

which the Petitioner was charged, Petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Evidence Rule 401, 402 and 403 were violated.

22. When the Trial Court received testimony concerning various uncharged allegations of violent behavior, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

23. When the Prosecutor's misconduct permeated the record, including relentless attacks upon the Petitioner's character through allegations of 'other acts', Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

24. When the Prosecutor testified without being sworn and allowed a witness to testify without being sworn, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

25. When the Prosecutor testified without being sworn regarding the Petitioner's political beliefs, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the

United States Constitution were violated.

F. Grounds for Relief Relating to Admission of Exhibits Into Evidence

26. When the Trial Court failed to exclude from the jury's consideration evidence that the Trial Court had already ruled was prejudicial and inflammatory, the Petitioner's right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated.

27. When the Trial Court failed to exclude from the jury's consideration gruesome photographs, both cumulative and prejudicial, lacking in significant probative value, the Petitioner's right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated.

G. Grounds for Relief Relating to Fair Trial Issues

28. When Mr. Spisak was impeached with his post-arrest silence, he was denied due process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

29. When, in the course of voir dire the jury was repeatedly informed by both the Trial Court and the prosecutor that

their death penalty verdict was "only" a recommendation to the Trial Court and not at all binding upon the Trial Judge, the Petitioner's constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

30. When the Trial Court, improperly and over defense objection, excluded potential juror Thomas J. Schmitt because of his views about the death penalty, Petitioner was deprived of a fair trial and impartial jury as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

H. Ground for Relief Relating to Bias and Sympathy

31. When witnesses were permitted to testify about the victims and their families solely to arouse the sympathies and emotions of the jury, the Petitioner's right to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated.

I. Ground for Relief Relating to Ineffective Assistance of Counsel

32. Mr. Spisak was denied the effective assistance of counsel during all phases of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution.

J. Ground for Relief Relating to the Constitutionality of Ohio's Death Penalty

33. The statutory provisions governing the Ohio capital punishment scheme suffer from multiple constitutional inadequacies, which render the entire scheme unconstitutional on its face.

VI. GROUNDS FOR RELIEF

A. Grounds for Relief Related to Petitioner's Plea of Not Guilty by Reason of Insanity

1. First and Second Grounds for Relief

In his first and second grounds for relief, Spisak contends that the trial court violated his right to a fair trial and invaded the fact finding function of the jury when it excluded the testimony of Dr. Oscar Markey. Spisak contends the trial court violated his constitutional rights when, after initially permitting Dr. Markey to testify on Spisak's behalf, the court altered its decision and excluded the testimony. The court finds that neither ground is procedurally defaulted. Ground One was raised to the Ohio Supreme Court as Proposition of Law VII. Ground Two also was raised to the Ohio Supreme Court as Proposition of Law V. Consequently, the court will address both claims on their merits.

After Spisak entered a plea of not guilty by reason of insanity, the trial court ordered Spisak to undergo a mental examination pursuant to Ohio Rev. Code § 2945.39 (current version at Ohio Rev. Code §

2945.371(E)). Thereafter, five doctors in the fields of psychiatry and psychology examined Spisak. Four explicitly found that Spisak's mental condition did not support an insanity plea. Dr. Markey, however, was ambivalent in his report and the defense sought to have him testify at trial. The trial court heard extensive in limine testimony from Dr. Markey in which he asserted that although Spisak did not suffer from a mental disease or defect, he did have a personality disorder and that he was unable to control his actions during the commission of the crimes. While Dr. Markey at times wavered as to his conclusion regarding Spisak's sanity at the times the crimes were committed, the court determined there was sufficient evidence to permit him to testify before the jury.

Upon cross-examination during trial, however, Dr. Markey's testimony, taken as a whole, was not ambivalent. He clearly indicated the defendant was not insane at the time of the commission of the crimes. The prosecutor questioned Dr. Markey:

> Q: You said that he was unable to control his impulse to assault?
>
> A: That's right.
>
> Q: And what you are saying now, that is not the same thing as irresistible impulse?
>
> A: That's right.
>
> Q: But you are saying he had the ability to resist that impulse if he thought it was in his best interest to do so?

A: That's right. That's part of the personality disorder. That's right.

***

Q: My question, he was able to control his impulse to assault to the ability that you just said? He made a conscious decision at the time to shoot and he could just as easily have made a conscious decision not to shoot if it was in his mind to do that?

A: You are indicating that he was calculating.

Q: Well, that's what you are saying, too, isn't it?

A: He could at times control it; at other times he would decide that he didn't need to control it.

Q: Right. Are you agreeing with that?

A: Yes.

Q: Okay. So he was able to conform his conduct to the requirements of the law, if that's what he wanted to do? He just chose not to do it?

A: There must have been times and there were these times when that was true.

Q: And there were times that he chose to control it, there were times that he chose not to conform his conduct to the requirements of the law?

A: That appears to be the case.

Q: And that was his decision that he made?

A: Yes.

***

Q: I'm indicating to you, doctor, and asking for your opinion is that he made a conscious decision to shoot, or not to shoot on each case that we have in this indictment?

A: Yes, he was not in a frenzy where he didn't know what he was doing. He had a conception of what he was doing and he realized that he could have—

Q: He could have refrained from pulling the trigger on any of those five [occasions], had he chosen to do so?

A: Yes.

(Tr. 1992-1995). Although defense counsel tried to rehabilitate Dr. Markey's testimony, it only proved further damaging as he stated on re-direct:

> The questions have been asked me before indicate that in every instance in which he did assault, whether he killed or not, he was calculating and knew whether or not he could go ahead, in his view, he was positive in doing it, that he had enough conscious control over it to do it at a time when it would be to his advantage. . . .

(Tr. 1997). The following day, outside the presence of the jury, the court concluded that Dr. Markey's testimony did not meet the "minimal standard" required for the submission of the testimony to the jury and subsequently directed the jury to disregard it. (Tr. 20 17). Spisak argues that the trial court's decision to exclude Dr. Markey's testimony violated his right to a fair trial and unconstitutionally invaded the role of the jury as factfinder.

The Sixth Circuit addressed an issue similar to that raised herein in *Matlock v. Rose*, 731 F .2d 1236 (6th Cir. 1984). In that case, the petitioner claimed the trial court improperly excluded the testimony of a psychologist who testified that the petitioner knew right from wrong on the intellectual level of an eight or nine year old. The Sixth Circuit disagreed. First, the court noted that "[e]rrors of application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus actions." *Matlock*, 731 F.2d at 1242 (citing *Bell v. Arn*, 536 F.2d 123 (6th Cir. 1976); *Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1975)). Hence, a habeas court can grant relief only when the error effectively denies the defendant a fundamentally fair trial. *Id.* (citing *Maglaya v. Buchkoe*, 515 F.2d 265 (6th Cir. 1975), *cert. denied*, 423 U.S. 931 (1975); *Gemmel v. Buchkoe*, 358 F.2d 338 (6th Cir. 1966), *cert. denied*, 385 U.S. 962 (1966); *Handley v. Pitts*, 491 F. Supp. 597 (E.D. Tenn. 1978); *aff'd*, 623 F.2d 12 (6th Cir. 1980)).

The Sixth Circuit went on to examine Tennessee insanity law and noted that the excluded

testimony would only have undercut the defense because the psychologist could not testify that the defendant did not know the wrongfulness of his conduct as the law required. Concluding that the excluded testimony would have, "[a]t best. . . shown that Matlock was retarded with some brain damage," the court affirmed the district court's denial of the writ. *Id.* at 1243.

Utilizing the guidance that *Matlock* provides, the court will analyze Spisak's claim under Ohio insanity law in light of the restrictions placed on a reviewing habeas court. Pursuant to the Ohio Revised Code, "a person is 'not guilty by reason of insanity' relative to a charge of an offense only if he proves. . . that at the time of the commission of the offense, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his acts." Ohio Rev. Code § 2901.01(N) (current version at Ohio Rev. Code § 2901.01(A)(14)); *State v. Staten*, 267 N.E.2d 122, 124 (Ohio 1971). Although a person is no longer presumed sane once he or she pleads not guilty by reason of insanity, Ohio Rev. Code § 2943.03, a defendant has the burden of proving this affirmative defense by a preponderance of evidence. Ohio Rev. Code § 2901.05. "Proof that a person's reason, at the time of the commission of an offense, was so impaired that the person did not have the ability to refrain from doing the person's act or acts, does not constitute a defense." Ohio Rev. Code § 2945.391.

In addition to the statutory law cited above, the court finds *State v. Dotson*, No. 43629, 1982 WL 2330 (Ohio Ct. App. Feb. 4, 1982), instructive. In

that case, the defendant pleaded not guilty by reason of insanity for shooting a car salesman who sold him a car in need of many repairs. During trial, three expert witnesses found that the defendant suffered from paranoid schizophrenia but were unable to conclude that the defendant was legally insane during the murder. *Id.* at *3. Thus, the trial judge found "that the defense did not sustain the burden of proving insanity by a preponderance of the evidence" and excluded all such evidence from the jury. *Id.* (internal quotation marks omitted).

On appeal in that case, the Eighth District Court of Appeals determined that the trial judge acted properly. Contrary to Dotson's assertions that the trial court had invaded the fact finding function of the jury, the Eighth District held that "while issues of credibility and weight remain reserved for jury determination, issues pertaining to admissibility are vested in the discretion of the trial court." *Id.* at *4 (citations omitted). Therefore, the court determined that the trial court properly had excluded such evidence as irrelevant pursuant to Ohio Rule of Evidence 104. *Id.* at *5.

The court finds that Spisak's constitutional right to a fair trial was not violated when the trial court excluded Dr. Markey's testimony. Similar to the *Dotson* experts, Dr. Markey did not testify that Spisak was suffering from a mental disease or defect which caused him not to understand the wrongfulness of his acts at the time he committed the murders. Because Dr. Markey stated on cross-examination that Spisak could control his actions on each occasion, the court concurs with the Eighth

District Court of Appeals, which determined: "It is difficult, if not impossible, to see how Markey's testimony would, in any fashion, have assisted the jury in reaching a conclusion on the legal insanity of [Spisak]. Primarily, the testimony reinforced the argument that the appellant was sane at the time of the acts." *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992, at *6 (Ohio Ct. App. July 19, 1984). Accordingly, the court finds that the Ohio Supreme Court's denial of this claim was not unreasonable and Spisak's first and second grounds for relief are not well-taken.

2. Fourth Ground for Relief

Also related to his insanity defense, Spisak asserts in his fourth ground for relief that he was denied the right to a fair trial when the trial court refused to instruct the jury on the insanity defense. After excluding Dr. Markey's testimony, the defense counsel called Spisak's sister and his ex-wife. Both testified that Spisak, on occasion, behaved strangely, particularly since his involvement in a near-fatal car accident. Spisak's sister noted that when he spoke of the murders he had "a glazed look" in his eyes (Tr. 2030). Additionally, Spisak's ex-wife testified that after the car accident he became more involved with Nazi activity and began dressing as a woman (Tr. 2075-76). Because of this testimony, defense counsel timely objected to the court's decision to exclude the insanity charge, asserting that the defense had supplied sufficient lay witness testimony to warrant it (Tr. 2400). Petitioner now reasserts that argument.

The court finds that this claim is not procedurally defaulted. Spisak raised this claim to

the Ohio Supreme Court as Proposition of Law IV. Accordingly, the court will address this claim on the merits.

Because jury instructions errors typically are matters of state law, the standard for demonstrating that a jury instruction caused constitutional error in a habeas proceeding "is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). "The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Id.* (citations and internal quotation marks omitted). Moreover, a habeas petitioner's "burden is especially heavy [when] no [affirmatively] erroneous instruction was given . . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155.

In this claim, Spisak fails to carry this burden. Although Ohio courts long have held that a defendant's insanity is a factual question for the jury, the defendant must meet some minimal threshold to justify consideration by the jury:

> 'Under a plea of not guilty by reason of insanity, the burden of establishing such a defense rests upon the defendant by a preponderance of the evidence. When from the evidence reasonable minds may reach different conclusions upon the question of insanity, such

> question of fact is for the jury. If, however, after giving the evidence the most favorable interpretations in favor of the defendant, reasonable minds can come to but one conclusion and that conclusion [is] adverse to [the] defendant, it is the court's duty to rule on the issue as a matter of law.' *State v. Ross*, 108 N.E.2d 77,86 (Ohio Ct. App. 1952), appeal dismissed, 108 N.E.2d 282 (Ohio 1952).

State v. Gaines, 318 N.E.2d 857, 864 (Ohio Ct. App. 1974).

Ohio courts have determined that a defendant need not provide expert testimony to meet his or her burden of proof to send the insanity issue to the jury. *State v. Reynolds*, 550 N.E.2d 490, 495 (Ohio Ct. App. 1988). A review of Ohio decisions in which lay testimony established a defendant's burden of proof, however, reveals that such testimony involved much more significant evidence of the defendant's mental illness than that presented by Spisak's sister and ex-wife. For example, in Reynolds, evidence had been submitted that defendant suffered from a severe mental disorder that required constant use of anti-psychotic medication. *Id.* at 496. The defendant's sister testified that the defendant had been off his medication for three days prior to committing the offense. *Id.*

Moreover, Spisak's reliance on *United States v. Smith*, 437 F.2d 538 (6th Cir. 1970), is misplaced and only serves to undercut his assertion that lay testimony is sufficient to establish insanity. In

Smith, the United States Commissioner[9] in Cincinnati, before whom the defendant appeared several times, and a Federal Bureau of Investigations officer, who arrested defendant, testified in rebuttal to a defense psychiatrist that defendant "did not appear particularly abnormal." *Id.* at 541. The Sixth Circuit held the federal officials' testimony was of little probative value and should have been excluded because "[n]othing in their testimony even remotely suggested a basis for making a judgment whether appellant was able to conform his conduct to the requirements of the law." *Id.* Thus, Smith stands for the proposition that only lay testimony that tends to demonstrate a defendant's sanity at the time the crimes were committed is probative and therefore admissible.

Just as in *Smith*, Spisak's sister and ex-wife's testimony did nothing more than demonstrate Spisak occasionally behaved strangely. Their testimony did not support the conclusion that he was insane at the times the crimes were committed, i.e., that he suffered from a mental disease which caused him not to understand the wrongfulness of his acts. Consequently, the trial court properly determined that Spisak did not, as a matter of law, produce evidence sufficient to require a jury instruction on

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[9] The title "United States Commissioner" referred to in the text is the position which is currently held by United States Magistrates. The Magistrate System replaced the Commissioner system with the passage of the Federal Magistrate Act of 1979. L. Ralph Mecham, *A Guide to the Legislative History of the Federal Magistrate Judges System* 4-8 (1995).

the insanity defense. Because the trial court's ruling does not violate the bounds of due process, the court finds the Ohio Supreme Court's decision was not unreasonable. Accordingly, Spisak's fourth ground for relief is not well-taken.

3. Third Ground for Relief

In Spisak's Third Ground for Relief, he claims that the trial court impermissibly infringed on his right to testify on his own behalf when it sustained numerous prosecutorial objections regarding his religious beliefs. Trial counsel based their insanity defense on assertions that Spisak felt God had guided him to kill and permitted him to escape from the murder scene undetected. Because the prosecution objected to, and the trial court sustained, some questions regarding Spisak's religious beliefs in relation to the murders, Spisak contends he was effectively denied the right to testify on his own behalf.

The court finds that this ground for relief is not procedurally defaulted as it was raised on direct appeal to the Ohio Supreme Court as Proposition of Law VII. The court, therefore, will address the merits of the claim.

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)). "The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of

law include a right to be heard and to offer testimony." *Id.*

Spisak cannot successfully claim that he was denied this testimonial right. As Respondent notes, Spisak's testimony spans over five hundred (500) pages of trial transcript. Moreover, Spisak was permitted to testify on numerous occasions regarding his religious beliefs. (Tr. 1362-63, 1396, 1401-02, 1405, 1429-30, 1449, 1453, 1482). Most significant was a court ruling that took place during sidebar. During direct examination of Spisak, defense counsel was attempting to demonstrate the relationship between Spisak's beliefs regarding Naziism and his religious beliefs (Tr. 144). The prosecutor objected to this line of questioning and, thereafter, the following conversation took place:

> The Court: Mr. Nugent.
>
> Mr. Nugent: I have objected to the last question on the basis that I don't believe that it is relevant to the inquiry.
>
> ***
>
> The objection - another thing, my impression of this testimony is that the defendant is explaining to this jury that not only is he guilty of the crimes charged, but that he is explaining to them why he is guilty and everything that surrounds it. It is a complete admission of his guilt. My objection is not only to the relevancy, but it is to make this record clear, I'm aware of what's going on, and if the defense has a

reason, or motivation, that he wants to get all these admissions in front of them, that's their tactic, as long as the record is aware that's their purpose.

The Court: Mr. Shaughnessy.

Mr. Shaughnessy: Your honor, rest assured that this examination is not a Kamikaze attempt to later claim foul to the Appellate proceedings. The record on Tuesday is replete, and we have the transcript, about the cross to bear, that God directed each of his operations. Unlike (the prosecutor), I think I share the view of almost everyone who heard and read that, that this guy is an absolute certified lunatic.

As far as we know, God didn't send him to do these things. His relationship with God and God giving him the cross, the job as he foresaw he, he explained the other day, God was right there on his right shoulder, so to speak, or he was on God's leash, if you will, directed certainly by God.

Now, we went into that the other day. He explained the thrust of the – the thrust of the State's case, and I might say this is in the evidence that has been admitted, and that should be in the record. There is just literally tons and tons of things that have to do with God, the Nazi Part, the White People's Party, the relationship with Jesus Christ and

> certainly we have got into that the other day as we still have three or four more – two more killings to explore. And we would like to –
>
> The Court: I will overrule the objection.

(Tr. 1445-48.)

Thereafter, the court permitted Spisak to testify about the relationship between his Nazi beliefs and its affiliation with Jesus Christ and the Bible. Because, contrary to Petitioner's assertions, the trial court permitted substantial testimony regarding the religious forces he felt guided him towards murder, Spisak was neither denied the right to testify on his own behalf nor was he denied the right to present his insanity defense. Accordingly, the Ohio Supreme Court's determination regarding this claim was reasonable. Spisak's third ground for relief is without merit.

B. Grounds for Relief Related to the Mitigation Phase

1. Faulty Jury Instruction Claims

In his Fifth, Seventh, Eighth and Ninth Grounds for Relief, Spisak maintains that the trial court erred when charging the jury on several occasions during the mitigation phase of trial. The court will examine each claim individually, mindful that an incorrect jury instruction does not warrant federal habeas corpus relief if it was merely undesirable, erroneous or universally condemned. Instead, the instruction must violate a constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

Upon review, a court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence. *Boyd v. California*, 494 U.S. 370, 380 (1990). The impropriety of the instruction must be considered in the context of the instructions as a whole and the trial record. *Id.* Rarely will an erroneous jury instruction justify reversal in a criminal case when no objection was made during trial. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The court now turns to Spisak's individual claims for relief.

a. Fifth Ground for Relief

In his Fifth Ground for Relief, Spisak maintains the trial court erred when it instructed the jury on nineteen separate aggravating circumstances regarding four aggravated murder charges originating from three murders. Spisak asserts that the multitude of aggravating circumstances supplied by the trial court upset the "delicate balance" a jury must review during the weighing of aggravating circumstances and mitigating factors at the penalty phase of the trial, causing the jury to favor a death sentence.

Initially, the Court notes this claim is not procedurally defaulted because Spisak raised this claim to the Ohio Supreme Court as Proposition of Law I. Accordingly, the court will address the claim on the merits. Before releasing the jury to deliberate during the mitigation phase of trial, the court charged the jury on the definition of an aggravating circumstance:

> Now, aggravating circumstance. What is an aggravating circumstance?
>
> In this case the aggravating circumstances are the specifications upon which you returned guilty verdicts in four separate counts of the indictment.

(Tr. 2967). Thereafter, the court repeated all nineteen specifications.[10]

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[10] The specifications, as taken from the trial transcript, were as follows:

> "One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed Brian Warford.
>
> "Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed Timothy Sheehan."
>
> "Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender attempted to kill Coletta Dartt.
>
> "Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of the course of conduct in which the offender attempted to kill John Hardaway."
>
> In count five, aggravated murder, the murder of Timothy Sheehan while committing or attempting to commit or while fleeing

immediately after committing or attempting to commit aggravated robbery, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed aggravated murder and that the victim of the aggravated murder was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"Six, that the defendant committed aggravated murder and that the offense was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit an aggravated robbery, and that the offender was the principal offender in the commission of the aggravated murder."

In count six, aggravated murder, the murder of Timothy Sheehan, with prior calculation and design, they are as follows:

"That the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"That the defendant committed the offense of aggravated murder and the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed the offense of aggravated murder and that the victim of the aggravated murder presented above was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

In count eight, aggravated murder, the murder of Brian Warford with prior calculation and design, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender

On appeal, the Eighth District Court of Appeals determined that Spisak was improperly convicted of two counts of aggravated murder for the death of Timothy Sheehan. The court stated:

> The appellant was indicted on four counts of aggravated murder for the murders of three people. Two counts of aggravated murder, the fifth and sixth counts of the indictment, were for the murder of one individual, Timothy Sheehan. The appellant was subsequently convicted for and sentenced on all four counts of aggravated murder.
>
> R.C. 2941.25(A) provides:

> purposely killed Brian Warford and also purposely killed Horace Rickerson.
>
> "Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely killed Timothy Sheehan.
>
> "Three, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill Coletta Dartt.
>
> "Four, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill John Hardaway."

(Tr. 2967-72).

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> Accordingly, while it was proper for the appellant to have been indicted on two separate counts of aggravated murder for the murder of Timothy Sheehan, he could only be convicted on one of those counts.

State v. Spisak, Nos. 47458, 47459, slip op., 1984 WL 13992, at *7 (Ohio Ct. App. July 19,1984). Thus, the trial court should not have charged the jury on one set of specifications relating to Sheehan's death.

Moreover, the Ohio Supreme Court noted that the trial court incorrectly failed to merge the specifications. That court held that each aggravated murder count should have contained only one specification because they arose from one single course of conduct. *State v. Spisak*, 521 N .E.2d 800, 803 (Ohio 1988). Finally, Spisak alleges that the specification that he killed Sheehan to escape apprehension or punishment for the murder of Rickerson should also merge because it must be construed as a single course of conduct flowing from the Rickerson murder. Spisak does not, however, provide statutory support for such a conclusion.

Thus, according to Spisak, the trial court should have read only three specifications to the

jury:[11] (1) that the defendant committed the offense of aggravated murder against Horace Rickerson that was part of a course of conduct to kill or attempt to kill two or more persons; (2) that the defendant committed the offense of aggravated murder against Timothy Sheehan that was part of a course of conduct to kill or attempt to kill two or more persons; and, (3) that the defendant committed the offense of aggravated murder against Brian Warford that was part of a course of conduct to kill or attempt to kill two or more persons. Petitioner asserts this failure to "merge" the specifications pursuant to state law violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to the United States Constitution.

Although no United States Supreme Court case is directly on point, *Clemmons v. Mississippi*, 494 U.S. 738 (1990), offers some guidance. In that case, the jury found that the state established two statutory aggravating circumstances and sentenced the petitioner to death. *Id.* at 742. The Mississippi Supreme Court later invalidated one of the aggravating circumstances as unconstitutionally vague but upheld the death sentence because the appellate court re-weighed the sentencing decision without the invalidated aggravating factor and found it appropriate. *Id.* at 743. The United States Supreme Court held that a death sentence could be upheld on appeal even when the jury had considered

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[11] Spisak does not elaborate on why the trial court should not have instructed the jury on the specification that Timothy Sheehan was killed during the commission of aggravated robbery.

an invalid or improperly defined aggravating factor. The court determined:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one or two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Id. at 745 (citations omitted). The Court remanded the case, however, because the Mississippi Supreme Court did not adequately explain its harmless error review after excluding the invalidated aggravating circumstance. *Id.* at 751.

The Court revisited the issue of vague aggravating circumstances in *Stringer v. Black*, 503 U.S. 222 (1992). In *Stringer*, the Court further clarified the state appellate re-weighing process necessary to uphold a death sentence resulting from a constitutionally impermissible aggravating circumstance. First, the Court divided states into "weighing" states or "finding" states. In the first category, a state's capital sentencing process requires the jury to find at least one aggravating

circumstance, then weigh that evidence against any mitigating circumstances. *Id.* at 229. In "finding" states, however, a jury must find the existence of one aggravating circumstance before considering the death penalty but the aggravating circumstances do not have a specific function in the jury's decision to impose the death penalty. *Id.*

The Court determined appellate review in a "weighing" state would require closer scrutiny than a "finding" state. In weighing states, the Court opined, ". . . for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor." *Id.* at 230. Moreover, the Court cautioned appellate courts to subject a death sentence to even closer scrutiny when the trial court utilized a vague or imprecise factor. In those instances, a reviewing court must, ". . . at the very least [conduct a] constitutional harmless-error analysis or re-weighing in the state judicial system." *Id.* at 237.

Because the degree of a reviewing court's scrutiny depends heavily upon the type of state in which a petitioner was convicted, the court first must determine whether Ohio is a "weighing" state or a "finding" state. A brief review of the Ohio Revised Code reveals it is the former. The Revised Code provides:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt. .

> . the court, trial jury, or panel of three judges **shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following [mitigating] factors**

Ohio Rev. Code § 2929.04(B) (emphasis supplied).

After concluding that Ohio is a weighing state, the court must next ascertain whether the Ohio Supreme Court sufficiently re-weighed the aggravating circumstances on review. The court finds that the Ohio Supreme Court did sufficiently articulate its re-weighing process. After concluding that it "independently determined that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt," *State v. Spisak*, 521 N.E.2d 800, 803 (Ohio 1988), the court went on to analyze the mitigation presented in light of the aggravating circumstances:

> Of the mitigating factors specified in R.C. 2929.04(B) appellant relied solely on his allegation that he lacked, due to mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3). Although appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony,

> from both defense and rebuttal expert witnesses, established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.
>
> Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond a reasonable doubt, on the side of the aggravating circumstances of which appellant was convicted.

Id. at 803-04.

Despite the Ohio Supreme Court's re-weighing after merging the aggravating circumstances, Petitioner contends that *State v. Davis*, 528 N.E.2d 925 (Ohio 1988), *cert. denied*, 488 U.S. 1034 (1989), mandates this court grant him relief. *Davis*, however, is easily distinguishable. In *Davis*, the Ohio Supreme Court vacated the appellant's death

sentence because the three-judge panel had improperly made "prior calculation and design" an aggravating circumstance although it is not listed as such in the Ohio Revised Code. *Id.* at 935. Although the Ohio Court of Appeals attempted to "cure" this defect by conducting an independent re-weighing, the Ohio Supreme Court rejected "independent review as a cure in this particular action because [it could] not know if the result of the weighing process by the three-judge panel would have been different had the impermissible aggravating circumstances not been present." *Id.* at 372.

Ohio courts have limited the scope of the Davis holding to its facts. For example, in *State v. Green*, 609 N.E.2d 1253, 1260 (Ohio 1993), a three-judge panel considered the "nature and circumstances" of a capital murder but did not indicate specifically that it used those facts to comprise an aggravating circumstance as did the Davis trial court. The Ohio Supreme Court, inferring that the panel considered the "nature and circumstances" evidence in a proper manner, held that ". . . this court's independent assessment of the sentence would cure any deficiency in the trial panel's sentencing decision." *Id.* (citing *Clemmons v. Mississippi*, 494 U.S. 738 (1990)).

Both *Clemmons* and *Stringer* dealt with a jury's consideration of vague or improper aggravating circumstances. In the case, however, all nineteen aggravating circumstances were properly delineated before the jury. Spisak does not complain about the content of the questions given to the jury, but rather of the cumulative effect of otherwise

constitutionally sound aggravating circumstances. The court finds this error less egregious than pem1Itting a jury to consider an aggravating factor that exceeds constitutional bounds.

Moreover, unlike the *Davis* appellate court, in the instant case, the Ohio Supreme Court articulated its re-weighing process upon merging the aggravating circumstances. This court is not left to speculate what the Ohio Supreme Court would have done in its re-weighing once the aggravating circumstances were merged. Finally, if as the Supreme Court has determined, re-weighing can cure a defect produced when a jury considers an unconstitutional aggravating circumstance, then, *a fortiori*, a court can cure problems associated with the cumulative effect of constitutionally permissible aggravating circumstances. Consequently, the Ohio Supreme Court cured any defect occurring from the jury's consideration of the nineteen specifications.

Out of an abundance of caution, the court will, nevertheless, subject the trial court's failure to merge the specifications to a harmless error analysis. The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether "the error had [a] substantial and injurious effect or influence in detenl1ining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted). When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the court must conclude that the error affected the

jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

Subjecting the trial court's failure to merge the specifications to the harmless error test, the court finds this error harmless beyond a reasonable doubt. Given the facts upon which the aggravating circumstances were predicated - the nature and number of crimes Petitioner committed - the court finds the jury's verdict would not have been affected if the specification merger had occurred. The Ohio Supreme Court's decision to deny this claim was not unreasonable. Thus, Petitioner's Fifth Ground for Relief is not well-taken.

b. Seventh Ground for Relief

Spisak next asserts that the trial court erred because the it improperly instructed the jury that its sentencing recommendation had to be unanimous, yet failed to explain to the jury what action it should take in the event that it failed to reach unanimity. Spisak also claims that the verdict forms, requiring twelve signatures, i.e., unanimous agreement as to the verdict, prejudiced his proceeding. Instead, Spisak alleges, the trial court should have instructed the jury that if they were unable to unanimously agree to death, they must impose a life sentence.

The court finds that Spisak has not defaulted this claim because he raised it as the LIV (54th) Proposition of Law to the Ohio Supreme Court. The court now addresses the claim on its merits.

At the conclusion of the mitigation phase, the trial court instructed the jury in regard to sentencing as follows:

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court.
>
> I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr. A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

(Tr. 2974-75). The trial court also charged the jury regarding the verdict forms, in pertinent part, as follows:

Now, ladies and gentlemen, I may as well say something about the verdict form right now. There are two sets of verdict forms, one, "We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstance which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.

"We the jury recommend that the sentence of death be imposed and that the defendant Frank G. Spisak, Jr." - there is a spot for twelve signatures. All twelve of you will sign it if that is your verdict in this case.

There are four separate verdict forms for counts five, six and I believe it is eight. Now, there is also a set of verdict forms, same count numbers, read as follows:

"We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of COllll1itting are not sufficient to outweigh the mitigating factors present in this case. "We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving" – there is an asterisk for a spot on the verdict

> form for you to fill in either 20 or 30 years of imprisonment. And again, all twelve of you must sign whatever verdict it is you arrive at must be signed in ink.

(Tr. 2975-76). Spisak claims both instructions are unconstitutional because the jury was left unenlightened about the consequences of a jury deadlock. He speculates that this failure to inform may have lead some jurors to believe he possibly could escape a sentence without juror unanimity, perhaps leading a jury towards deciding for a death sentence rather than permit him to escape punishment altogether.

Spisak's assertions have been rejected by the United States Supreme Court in *Jones v. United States*, 527 U.S. 373 (1999). In *Jones*, the Court held that the Eighth Amendment requirement against "cruel and unusual punishment" does not require that a jury be instructed on the consequences of deadlock. *Id.* at 383. In that case, Jones had requested that the trial court charge the jury that, "if the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release . . .." *Id.* at 379. The trial court refused Jones's request and the jury unanimously recommended that he be sentenced to death. Jones argued that the trial court's failure to charge the jury on his proposed instruction violated his Eighth Amendment rights.

The Supreme Court disagreed. It first noted that "the proposed instruction has no bearing on the

jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role - when the deliberations break down and the jury is unable to produce a unanimous sentencing recommendation." *Id.* at 382. While the Court noted that the Eighth Amendment requires that a death sentence not be imposed arbitrarily, it stated that the government in a capital case has a "'strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)). The Court concluded that Jones's proposed instruction would thwart this interest. *See id.* at n.5 (noting that it has thus approved the use of a supplemental charge to encourage a deadlocked jury, even a capital sentencing jury, to engage in further deliberations) (citing *Allen v. United States*, 164 U.S. 154 (1896), *Lowenfeld*, 484 U.S. 231). Accordingly, the Court held that while a jury cannot be "affirmatively misled about its role in the sentencing process," the Eighth Amendment "does not require that the jury be instructed as to the consequences of their failure to agree." *Id.* at 381-82.

Jones is fatal to Spisak's claim in that it settled the question of whether a jury must be informed of the consequences of deadlock in the negative. Moreover, Spisak's assertion that a deadlocked jury would choose death, a more severe fonll of punishment, rather than life imprisonment, is based on pure speculation. Finally, Spisak cannot assert that the jury in his case was affirmatively misled about its role in the sentencing phase of his

trial. Consequently, Spisak's seventh ground for relief is without merit.

Before moving to Spisak's next claim, the court feels compelled to address another issue related to the sentencing instruction given by the trial court. Though he did not challenge it on this basis, it is arguable that the instruction would be susceptible of a constitutional attack on the ground that it required the jury to first unanimously reject death, a so-called "acquittal first" instruction, before considering a life sentence. The Sixth Circuit has recently held that such an instruction is unconstitutional. *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). Specifically, the Davis court held that an instruction requiring that a capital jury "must first unanimously reject the death penalty before it can consider a life sentence. . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills [v. Maryland*, 486 U.S. 367 (1988)]." *Id.* at 689.[12] Consequently, the court conditionally granted a writ of habeas corpus as to the petitioner's sentence. *Id.* at 691.

In this case, it is evident that the challenge Spisak raises with respect to the instruction given in his case relates only to the trial court's failure to charge the jury on the consequences of its failure to unanimously reach a verdict. He has not attacked the instruction as being constitutionally infirm for the reasons addressed by *Davis*. In fact, Spisak's briefs on the seventh claim do not even quote the

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[12] The jury instruction given in *Davis* was similar in pertinent respects to the one given to Spisak's jury.

language in the jury instruction that would relate to an "acquittal-first" instruction claim. See Traverse at 89. Even more importantly, Spisak did not cite in either his Petition or his Traverse either of the Supreme Court cases on which *Davis* was decided, *Mills* and *McKoy v. North Carolina*, 494 U.S. 433 (1990), both of which were decided long before Spisak filed his Petition. Therefore, the court declines to address whether Spisak's sentence was unconstitutional in light of *Davis*.[13]

c. Eighth Ground for Relief

In Spisak's Eighth Ground for Relief, he claims that the trial court improperly admonished the jury not to consider sympathy or prejudice when formulating its sentencing decision. Consequently, Spisak argues, the jury could show no mercy for him. Spisak raised this claim as his LV (55th) Proposition of Law to the Ohio Supreme Court. As such, the court will consider the merits of the claim.

During trial, the court cautioned the jury:

> Now, you must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the

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[13] Moreover, this issue is the subject of some discord in the Sixth Circuit. *Compare Davis, supra*, with *Roe v. Baker*, 316 F.3d 557, 564 (6th Cir 2002) (holding that instruction similar to that given in *Davis* did not violate *Mills*), *Henderson v. Collins*, 262 F.3d 615, 621-22 (6th Cir. 2001) (same), *Scott v. Mitchell*, 209 F.3d 854,875-6 (6th Cir. 2000) (same), and *Coe v. Bell*, 161 F.3d 320, 338 (6th Cir. 1998) (same).

> instructions of the court to your findings, and to render a verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

(Tr. 2976-77). Spisak maintains that the court's proscription against considering sympathy or prejudice prevented the jury from forming an individualized sentencing decision or basing that decision on mercy for the defendant.

A death-sentenced defendant made a similar argument in *California v. Brown*, 479 U.S. 538 (1987), asserting that an instruction preventing the jury from being swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was unconstitutional. *Id.* at 542. The Supreme Court rejected this argument, holding that "[e]ven a juror who insisted on focusing on [the phrase 'mere sympathy'] in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* Spisak cites *Brown* in his Traverse, attempting to distinguish it by noting, unlike the "catalog of the kind of factors that could improperly influence a jury's decision to vote for or against the death penalty" presented in the Brown

instruction, Spisak's jury was told not to be influenced by a mere two factors; sympathy or prejudice. Traverse at 91 (quoting *Brown*, at 543)

The court disagrees with both Spisak's legal interpretation of *Brown* and the factual assessment of the trial court's instruction. First, *Brown* upheld the constitutionality of the jury instruction based not on the quantity of factors the jury was told to disregard, but on how, taken as a whole, a "reasonable juror" would interpret the instruction. *Id.* at 542-43. The Court concluded that when read in context, "a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating." *Id.* at 543.

Moreover, according to Spisak's interpretation of *Brown*, his claim must fail. Spisak relies on only a part of the instruction given by the trial court. Although the trial court did initially instruct the jury not to be influenced by sympathy and prejudice, the court went on, as noted above, to admonish the jury to consider all evidence with "intelligence and impartiality" and without "bias, sympathy or prejudice." Using this "catalog" of items that should and should not influence the jury served to marginalize the word "sympathy," placing it in its proper context. The Ohio Supreme Court's decision to deny this claim was reasonable. Accordingly, Spisak's eighth ground for relief is not well-taken.

d. Ninth Ground for Relief

In Spisak's Ninth Ground for Relief, he claims that the trial court improperly instructed the jury

that it might consider any and all evidence in determining whether an aggravated circumstance existed. The court finds this claim is not procedurally defaulted as Spisak raised this claim as his VII (53rd) Proposition of Law to the Ohio Supreme Court. Thus, the court will address the merits of the claim.

At the close of the mitigation phase, the trial court instructed the jury as follows:

> Mitigating factors, what then are mitigating factors? Mitigating factors are those which, while not excusing or justifying the offense, or offenses, may, in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment. These mitigating factors include, but are not limited to, the history, character and background of the offender and the following factors:
>
> One, at the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Two, any other factors, that are relevant to the issue of whether the defendant should be sentenced to death.

(Tr. 2972-73) (emphasis supplied). Spisak extracts the above-emboldened language to claim that a juror might somehow unconstitutionally apply it to both aggravating and mitigating factors. Consequently,

Spisak claims, the jury did not suitably limit the evidence it was permitted to access, resulting in an arbitrary and capricious sentencing.

The court disagrees. Supreme Court jurisprudence dictates that a capital sentencer must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); see also *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (holding "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."). The court finds that the trial court comported with this constitutional mandate. When taken in context, rather than isolating portions of the mitigation charge as Spisak does in the Petition, it is clear that the trial court properly limited the jury's consideration of "any evidence" to mitigating evidence and a reasonable juror would interpret it as such. Therefore, Spisak's ninth ground for relief lacks merit and the Ohio Supreme Court reasonably concluded so.

2. Ineffective Assistance of Counsel Claims

In his sixth and tenth grounds for relief, Spisak asserts that his trial counsel provided ineffective assistance of counsel during the mitigation phase of trial and provides a litany of actions or inactions that he believes supports such claims.

The Sixth Amendment dictates that a criminal conviction must arise from "an adversarial process, rather than the ex parte investigation and determination by the prosecutor." *Nix v. Williams*, 467 U.S. 431, 453 (1984). As such, a criminal defendant is entitled to more than mere appointment of counsel. Counsel's performance during a criminal trial must be sufficient to ensure a defendant's trial was fair. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To determine whether a criminal defendant received the meaningful representation the Sixth Amendment mandates, a reviewing court must submit counsel's performance to a two-pronged analysis. *Id.* at 687. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in trial counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. As the Supreme Court stated, "'Judicial scrutiny of a counsel's performance must be highly deferential'" and . . . 'every effort [must] be made to eliminate the

distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Cone v. Bell*, 535 U.S. –, 122 S.Ct. 1843, 1852 (2002) (quoting *Strickland*, 466 U.S. at 689). A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Strickland* at 689.

When challenging a death sentence, "the question is whether there is a reasonable probability that, absent the efforts, the sentencer - including an appellate court, to the extent it independently re-weighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696.

Mindful of the above law, the court now turns to Spisak's grounds for relief.

a. Sixth Ground for Relief

Although Spisak did not divide this claim into sub-claims in his Petition, the court does so now for purposes of procedural default analysis.[14] In the sixth ground for relief, Spisak asserts that trial counsel essentially committed four types of error during the closing argument of mitigation. These errors are: (1) counsel's depiction of the murders and references to the victim's families; (2) personal references to Spisak that Spisak asserts were demeaning; (3) stating to the jury that the only

[14] For efficiency, the court has grouped similar claims together.

mitigation they could find was "within themselves"; and (4) referencing various of Spisak's acts as "aggravating circumstances." The court finds that Spisak's sixth ground for relief is not procedurally defaulted as all sub-claims were raised with the Ohio Supreme court as Proposition of Law LVII. Consequently, the court will subject each sub-claim to a merit review.

The Sixth Circuit's decision in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), provides some guidance on evaluating a claim that trial counsel provided ineffective assistance by verbally attacking his own client during the trial. There, the court found that Rickman succeeded in showing both that his trial counsel's performance was deficient and that he was prejudiced by the deficient performance when counsel "convey[ed] to the jurors an unmistakable personal antagonism toward Rickman, characterized both by attacks on Rickman and by repeatedly eliciting information detrimental to Rickman's interests." *Id.* at 1158. For example, rather than attempting to disassociate Rickman from a hand grenade that allegedly belonged to him but was unrelated to the murder for which he was on trial, Rickman's counsel actually elicited testimony from several witnesses in an attempt to link Rickman to the grenade. He even presented one witness to describe Rickman's threats to commit crimes with the grenade, all of which were, again, unrelated to the crime for which he was charged.

In addition, counsel went to considerable effort to portray Rickman as crazed and dangerous. He repeatedly asked one witness if he believed Rickman

was "nuts" and ridiculed the witness when he responded in the negative by saying, "You wouldn't know a psychiatric case if you saw one, would you?" *Id.* (quoting *Rickman v. Dutton*, 864 F.Supp. 686, 702 (M.D. Tenn. 1994)). He asked Rickman's girlfriend if Rickman ever "'act[ed] like a bull. . . I mean, violent. . . .'" *Id.* (quoting *Rickman*, 864 F.Supp. at 702). In response to testimony by one of Rickman's neighbors that he believed Rickman was a gentleman, counsel stated: "'[Nineteen)] years in the Marines and you would think that a man that looked like that was a gentleman?'" *Id.* (*quoting Rickman*, 864 F. Supp. at 703). The Sixth Circuit believed the following statement by Rickman's counsel during the sentencing phase of the trial best evidenced his patent hostility toward his client:

> I know this young woman was put in the trunk of that car. That's no secret. I know that. And I'm not happy about it. No sir, I'm not happy. I'm ashamed. I'm ashamed that we live in such a world. . . . I'm ashamed that this crime has been committed in our community. And I want the family of Debra Groseclose to know that. That I'm ashamed. I'm ashamed that this young woman died in this oven. Mr. Miler, I'm ashamed. I'm ashamed, Mr. Stanton. I don't condone murder. I know criminal defense lawyers suffer from what is called guilt by association. When I go to church Sunday, they are going to waylay me out at the Bellevue Baptist Church. . .

> (T)hat wild man (Rickman) over there with the gloves on - look at him. He's wild as a March hare, right now. He may take off after me in a minute. I don't know. He's crazy. I know he's crazy. Because if he's normal I can only say, thank you, God, I'm abnormal, an [sic] you are abnormal.

Id. at 1159 (quoting *Rickman*, 864 F.Supp. at 704 n.9).

In addition to these attacks on his own client, the court found that Rickman's counsel had completely abdicated his duty to provide a defense for Rickman. Counsel assumed there was no defense to the charge of first-degree murder against his client and failed to conduct any investigation. He did not interview any witnesses, conduct any legal research, or obtain any records, including those regarding Rickman's employment, education, or mental health. By his own account, he spent only sixteen hours preparing for Rickman's trial. Indeed, even though counsel claimed that it was his strategy during the sentencing phase to show that Rickman was a "sick boy", he forwent an insanity defense during the guilt phase. *Id.* at 1157.

Taking into account counsel's "total failure to actively advocate his client's cause with his repeated expressions of contempt for his client", the court found that he was ineffective. In fact, the court found that because counsel's behavior was so outrageous, Rickman was "'[f]unctionally . . . totally denied counsel even though his attorney [was] physically present during the proceedings. '" *Id.* at 1157

(*quoting Rickman*, 864 F.Supp. at 701). Therefore, despite the overwhelming evidence of Rickman's guilt, the court determined that counsel's peifol111ance dispensed with the need for a separate showing of prejudice under Strickland because "what (counsel) did. . . (was) worse than no representation at all" *Id.* at 1159.

None of Shaugnessy's conduct of which Spisak complains rises to the level of counsel's conduct in Rickman. Indeed, each of the alleged errors that Spisak asserts Shaugnessy committed during the closing arguments of the mitigation phase can easily be attributed to a trial strategy such that counsel's performance cannot be said to be "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. For example, Shaugnessy's vivid portrayal of the murders and his own expressed sympathy for the victim's families were likely part of a strategy to ingratiate himself with the jury and to blunt the prosecutor's depiction of the murders in his forthcoming closing argument. Given the crimes for which Spisak had been convicted, the jury might have seen Shaugnessy as callous if he had not acknowledged their heinous and brutal nature. Once counsel persuaded the jury that he could identify with their emotions toward Spisak, he could then explain to them that their feelings were misplaced because Spisak suffered from a mental defect.

Shaugnessy's negative references to Spisak were also clearly part of the defense's strategy in mitigation, that is, to show that Spisak's mental defect was a mitigating factor to be considered in

determining whether or not he should receive the death penalty. While Shaugnessy called Spisak "sick" and "demented", (Tr. at 2895), and similar adjectives throughout his closing, it is evident from reviewing these references in the context of the entire argument that they were made to support the claim that Spisak suffered from mental problems. Counsel's reference to "Jack the Ripper" likewise fails to support Spisak's claim of ineffective assistance. Although Spisak argues that counsel actually referred to him as Jack the Ripper, it is obvious from a reading of the entire statement at issue that this is not the case: "[E]ven Jack the Ripper didn't spend 24 hours a day strangling ladies in London with silk stockings." (Tr. at 2919). Furthermore, while cross examining the defense's experts, the Prosecutor attempted to undermine their findings that Spisak suffered from a mental defect by asserting that Spisak displayed rational behavior much of the time. Counsel's Jack the Ripper comment was plainly made in response to this assertion.

Next, counsel's statement that the only mitigation the jury could find was "within themselves" was not unreasonable. This statement was made as a preface to counsel's soliloquy on the values of American jurisprudence in which he believed each juror had been steeped. Specifically, after making this statement, counsel argued that:

> our country has been founded on (the belief) . . . that you can't commit a sin if you didn't have the ability to intend to do it. . . . And the reason we have this

> [mitigation] hearing is because we are a humane people. . . . We are different, and that's why our Legislature has put [this mitigating factor, whether, at the time of the committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, into the statute, because we are a humane people. So if we find a mitigating factor, ladies and gentlemen, it is nothing from within this sick tormented body, it is within ours. It is in the way we grew up, the things that we are proud of. The philosophies that we have, the beliefs that we are wiling to stand up and be counted for, and we are different.

(Tr. at 2898 - 2900). Counsel then went on at great length about the testimony from each of the defense's three psychological experts and how such testimony demonstrated that Spisak's mental defect substantially reduced his ability to conform his conduct to the requirements of the law. In other words, there is simply no question that by the end of counsel's closing argument the jury would not have understood that Spisak was relying on his mental defect as a mitigating factor and that, pursuant to the Ohio statute on mitigation, such reliance was proper.

Finally, counsel did not fall below *Strickland*'s standard for professional competence when he used

the words "aggravating circumstances" while depicting the murder scenes. This blunder, Spisak asserts, violated the holding in *State v. Jenkins*, 473 N.E.2d 264, 308 (Ohio 1984), which states that a part may not introduce evidence regarding non-statutory aggravating circumstances. Like Shaugnessy's portrayal of the murder scenes, counsel was likely attempting to preempt the Prosecutor's closing argument, which Shaugnessy knew would focus on the aggravating circumstances at issue. There is nothing in the transcript that would suggest that counsel was attempting to introduce evidence regarding any aggravating circumstances other than the specifications with which Spisak was charged. Moreover, Spisak overlooks the fact that closing argument does not comprise "evidence" that a jury may consider during deliberations. *State v. Brown*, 679 N .E.2d 361, 371 (Ohio Ct. App. 1996 (citing *State v. Turner*, 631 N.E.2d 1117, 1120 (Ohio Ct. App. 1993); *State v. McWhite*, 597 N.E.2d 168, 171 (Ohio Ct. App. 1991). Spisak's jury was so instructed. (Tr. 2354).

From the foregoing, it is apparent that this case is a far cry from *Rickman*. Whereas the effect of counsel's conduct in *Rickman* was "to provide Rickman not with a defense counsel, but with a second prosecutor," *Rickman*, 131 F.3d at 1156, the same cannot be said of Spisak's counsel. Every move Rickman's counsel made had the effect of portraying his client as a "hated and violent freak." *Id.* at 1160. While counsel in the instant case made sporadic references to Spisak that certainly cast Spisak in a negative light, each such reference was made for a particular purpose. Although it may not have been

necessary for counsel to speak negatively about Spisak to establish his defense, Spisak has not overcome the presumption that counsel's attacks on Spisak were part of an overall trial strategy. Moreover, counsel's negative references were flanked by his lengthy argument on the experts' testimony regarding Spisak's mental defect and the effect such defect had on his ability to conform his actions to the requirements of the law. Furthermore, in contrast to Rickman's attorney, who did nothing throughout either the guilt or the sentencing phase to provide his client with a defense, Spisak's counsel elicited testimony from numerous witnesses during the trial, including a number of psychological experts. As counsel's examination of these experts in the mitigation phase demonstrates, he was thoroughly familiar with each of their findings and the bases therefor. Moreover, he objected to numerous questions by the prosecution and made significant attempts to rehabilitate each of the witnesses on re-direct after cross examination.

Even assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior. For the reasons discussed above, the court cannot presume prejudice as did the court in Rickman. Unlike in that case, Spisak was not functionally denied counsel as each of the errors counsel allegedly made can be attributed to a trial strategy. Thus, the court must engage in the customary *Strickland* prejudice analysis. To ascertain whether counsel's performance prejudiced a criminal proceeding under Strickland, a reviewing court does not speculate whether a different trial strategy might have been more successful, but a

court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). On review, the court cannot find that any of counsel's alleged errors resulted in a fundamentally unfair proceeding.

Here, there is no question that Spisak committed the murders with which he was charged. Spisak spent a number of days testifying about the gruesome details of each. Therefore, this is not a situation where the verdict was "only weakly supported" and thus more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Strickland*, 466 U.S. at 696. Moreover, had counsel portrayed Spisak with sympathy, depicting him as a victim of an unhappy childhood and identity crisis, as Spisak now suggests he should have, the jury still would have been well within its province to decide that death was the appropriate sentence. There simply is not a reasonable probability that, absent counsel's alleged errors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *See id.* at 694. Given the heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of evidence, most of which Spisak supplied during his testimony, the court finds that any error counsel may have committed did not prejudice the fairness of Spisak's trial. The Ohio Supreme Court's decision to

deny this claim was not unreasonable. Accordingly, Spisak's sixth ground for relief is not well-taken.[15]

b. Tenth Ground for Relief

In Spisak's Tenth Ground for Relief, he asserts trial counsel's ineffectiveness for several acts or omissions during mitigation. Specifically, Spisak asserts that trial counsel erred when they failed to: (1) object to the trial court instructing the jury that it could consider nineteen specifications; (2) assert the statutory mitigating factor that Spisak had no criminal record pursuant to Ohio Rev. Code § 2929.04(B)(5); (3) prepare for the mitigation phase until after Spisak was found guilty; (4) assert Spisak's Nazi beliefs were a rationalization to cloak his personality disorder; (5) obtain records from the gender dysphoria clinic or interview the physicians who treated Spisak when he decided to undergo a sex change operation; (6) present evidence regarding Spisak's gender identification confusion and childhood sexual development; (7) meet with psychiatric and psychological experts before trial, (8)

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[15] With respect to Spisak's claims regarding counsel's comments that the only mitigation they could find was "within themselves" and his references to various of Spisak's acts as "aggravating circumstances" in particular, the court finds that the court's instructions to the jury on mitigating and aggravating circumstances alleviated any prejudice Spisak might have suffered from these comments. Specifically, after defining both terms, the court listed each of the aggravating circumstances at issue (i.e., the specifications charged in the indictment) and explicitly identified the mitigation circumstance on which Spisak was relying.

prepare mitigation experts; and, (9) object to the prosecutor's remarks.

The court finds that various sub-claims of Spisak's Tenth Ground for Relief were not raised to the Ohio Supreme Court and, thus, are procedurally defaulted. While sub-claims (3), (7), (8), and (9) were presented on direct appeal as part of Proposition of Law LVII, sub-claims (1), (2), (4), (5), and (6) were not presented on direct appeal although they were contained in the record.[16] Thus, these claims are

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[16] The court notes that Respondent was unable to supply Spisak's post-conviction relief brief in the Return of Writ. Consequently, the court is unable to determine precisely if Spisak raised any of these sub-claims as part of his post-conviction relief petition. The Eighth District Court of Appeals, in its decision denying post-conviction relief, noted that:

> A review of the record before this court demonstrate clearly that defendant-appellant's claims of ineffective assistance of counsel have been raised and litigated twice before this court and once before the Ohio Supreme Court. Accordingly, this court will not delve into those claims once more as they are barred by the doctrine of res judicata.

State v. Spisak, Case No. 67229, 1995 WL 229108, at *4 (Ohio Ct. App. April 13, 1995) (citations omitted). The court notes, however, that any claim that could have been raised on direct appeal but was not is unexhausted and would be barred under the Perry rule if raised in the Ohio courts. Consequently, the court deems any claims not raised on direct appeal that were cognizable at that juncture of the proceedings procedurally defaulted.

Spisak does not allege cause and prejudice necessary to excuse the procedural default of these claims.

procedurally defaulted. Even assuming they were not defaulted, the court finds that they are not meritorious.

Sub-claims (l), (2), and (5) are not well-taken because Spisak fails to demonstrate he was prejudiced by counsel's behavior. The court addressed sub-claim (l) as a separate, independent claim, finding that it lacked merit. Thus, Spisak cannot be prejudiced by counsel's inability to object to the trial court's introduction of nineteen specifications.

Second, the court finds that counsel's failure to raise Spisak's lack of prior criminal record as a mitigating factor pursuant to Ohio Rev. Code § 2929.04(B)(5), sub-claim (2), similarly fails. As stated in Strickland, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." Strickland, 466 U.S. at 696. In this case, there is a strong likelihood that the deluge of evidence supporting the aggravating factors would not have been countermanded by Spisak's prior lawful behavior. Moreover, the Ohio Supreme Court considered this mitigating factor in its re-weighing. *State v. Spisak*, 521 N.E.2d 800, 803-04 (Ohio 1988). Because the court finds the absence of this statutory mitigating factor does not undermine the court's confidence that the proceeding was fair, sub-claim (2) lacks merit.

Finally, the court finds counsel's failure to obtain and present to the jury records from the Gender Dysphoria Clinic of Cleveland Metropolitan General Hospital or interview physicians with whom

Spisak met as a result of his inquiries there, sub-claim (5), did not prejudice Spisak. During both the guilt and mitigation phase of trial, counsel introduced evidence that Spisak experienced gender identity confusion. Moreover, while counsel did not consult the records or physicians at the Gender Dysphoria Clinic, Dr. Bertschinger did. During mitigation, Dr. Bertschinger testified that he reviewed the records from the Clinic and utilized them in diagnosing Spisak. Further investigation into Spisak's gender confusion was unnecessary as it was adequately presented to the jury. Further psychiatric testimony would have been cumulative. Consequently, the court finds that sub-claim (5) is not well-taken.

Similarly, the court finds sub-claim (6), that counsel failed to present evidence regarding Spisak's sexual development, lacks merit as it is factually incorrect. As stated above, Dr. Bertschinger testified during mitigation that the records from the Gender Dysphoria Clinic "certainly substantiated Mr. Spisak's statement that he was interested in and pursued a sex change operation." (Tr. 2564.) Moreover, Dr. Bertschinger's testimony regarding Spisak's psychiatric diagnosis was comprised of several reports. One such report was that of Mr. Williger, a social worker with Cuyahoga County Court Psychiatric Clinic. Mr. Williger interviewed members of Spisak's family and gathered information regarding his childhood. It was unnecessary for counsel to duplicate those efforts. Consequently, sub-claim (6) is not well-taken.

Finally, sub-claim (4), that counsel was ineffective for failing to portray Spisak's Nazi beliefs as part of his mental disorder and identity crisis, must fail as it merely represents the hindsight second-guessing that *Strickland* seeks to avert. During trial, counsel's strategy was to portray Spisak an insane person who felt he was driven by God to kill as part of his Nazi beliefs. While Spisak now would prefer that counsel had presented a strategy that cast him as an individual fraught with identity confusion and mental illness, thus turning to Naziism as a symptom of such, that preference is of no avail. *Strickland* prohibits this hindsight review of trial strategy. Thus, the court finds this sub-claim lacks merit.

Spisak asserts in his third sub-claim, a non-defaulted claim, that the trial counsel failed to prepare for the mitigation phase of trial prior to the jury's guilt determination. This is contrary to the evidence in the record. Spisak cites *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), cert. denied, 519 U.S. 910 (1996), in which the Sixth Circuit held such unpreparedness in presenting evidence of a defendant's mental history violated the petitioner's Sixth Amendment right to effective assistance of counsel, in support of his position. Several other Sixth Circuit cases have followed this reasoning. See *Coleman v. Mitchell*, 268 F.3d 417, 449-53 (6th Cir. 2001) (finding counsel acted unreasonably for failing to present evidence of petitioner's horrific childhood, which included physical and psychological abuse); *Skaggs v. Parker*, 235 F.3d 261, 266-75 (6th Cir. 2000)(holding counsel ineffective for failing to investigate and present mitigating evidence);

Groseclose v. Bell, 130 F.3d 1161, 1169-71 (6th Cir. 1997) (finding counsel's failure to develop "any defense theory whatsoever" and failure to present mitigating evidence was constitutionally ineffective); *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997)(same).

In other more recent decisions, the Sixth Circuit has clarified its previous holdings, stating that "the cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct [a mitigation] investigation." *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001). The court distinguished cases in which counsel failed to investigate altogether from those which "do[] not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation," noting that in the latter, the *Strickland* presumption of counsel's reasonableness will be hard to overcome. *Id. See also Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002)(reversing district court and holding no ineffective assistance of counsel for failing to present mitigation evidence, particularly in light of habeas counsel's inability to demonstrate prejudice); *Martin v. Mitchell*, 280 F.3d 594 (6th Cir. 2002) (finding counsel not constitutionally ineffective for failing to present mitigating evidence when counsel did present some, albeit non-exhaustive, evidence in mitigation and petitioner failed to demonstrate prejudice); *Williams v. Coyle*, 260 F.3d 684 (6th Cir. 2001) (same).

Unlike in Glenn, counsel here contemplated the likelihood of a mitigation phase when he initially contacted Dr. Bertschinger, stating that the mitigation hearing "would probably be the 'ball game.'" (Tr. 2656.) More significant is the fact that the mitigation phase began on a Saturday, an unusual practice the trial court noted, so that defense counsel could present the testimony of three experts he had consulted before they went on vacation. (Tr. 2414.) Given the extensive expert testimony provided during mitigation, the court finds that counsel prepared for mitigation prior to the conclusion of the guilt phase. Thus, Spisak's third sub-claim is without merit.

In his seventh sub-claim, Spisak also asserts ineffectiveness because defense counsel never met with Drs. Bertschinger or Markey before trial. This fact is irrelevant, however, because counsel communicated with both experts on several occasions prior to trial and was aware of the their findings. In fact, Dr. Bertschinger testified that an actual face-to-face meeting with counsel was unnecessary and did not affect his contact or diagnosis with Spisak. (Tr. 2698-99.) As such, Spisak cannot now assert he was prejudiced by counsel's failure to meet with either doctor prior to trial. Consequently, the court finds sub-claim (7) is not well-taken.

Spisak also asserts counsel's ineffectiveness because counsel failed to supply Dr. Bertschinger with Dr. Markey's reports. This fact, claims Spisak, is a further indication of counsel's unpreparedness. Once again, however, Spisak fails to demonstrate the prejudice he suffered because of counsel's inaction.

Given the fact that three experts testified regarding the state of Spisak's mental health, it is unclear how counsel's omission would have changed the outcome of the proceeding. Accordingly, Spisak's eighth sub-claim is meritless.

Finally, in sub-claim (9), Spisak contends that trial counsel were ineffective for failing to object to the prosecutor's remarks and questions. Specifically, Spisak argues that defense counsel should have objected to the following exchange between the prosecutor and Dr. McPherson:

> Q: And everyone to a certain extent has a personality disorder?
>
> A: No, I did not so testify.
>
> Q: Well, I'm asking.
>
> A: No.
>
> Q: How about all the people in the penitentiary here?
>
> A: There is a high proportion of persons in the penitentiary who would be diagnosed as having certain other personality disorders, notably conduct disorder unsocialized or conduct disorder socialized.
>
> Q: And sure, that's what winds them up in the penitentiary. If they do that, if they shoot - if they realized if they go out, rob the guy at McDonald's, shoot him, I'm going to get the electric chair, that's stupid if I do that, if they realize those things beforehand, our police

> department would be out of business and our penitentiary would be out of people.
>
> A: That would be nice.

(Tr. 2489-90.) Spisak further argues that this interchange somehow suggested to the jury "that non-statutory aggravating circumstances should be considered by the jury." Traverse at 40. The court finds it was not error for trial counsel to fail to object to the above interchange. At that point of the proceeding, the prosecutor was rebutting the defense's assertion that Spisak's personality disorder should, in some capacity, diminish the responsibility he should bear for committing the crimes. The prosecutor was attempting to demonstrate that many individuals who commit crimes suffer from various personality disorders yet society holds them responsible for their actions. This attempt at rebuttal through questioning Dr. McPherson's diagnosis was acceptable in light of defense counsel's assertion. Consequently, it was acceptable for defense counsel not to object to it. The court finds the Ohio Supreme Court's decision to deny these claims on direct appeal was not unreasonable. Thus, Spisak's ninth sub-claim is not well-taken.

3. Prosecutorial Misconduct Claims

In grounds for relief eleven and twelve, Spisak asserts prosecutorial misconduct during the mitigation phase of trial. To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the

prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). This question must be answered in light of the totality of circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467,473 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990). The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989) (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

The Sixth Circuit engages in a two-pronged analysis when determining whether prosecutorial misconduct violated a defendant's due process rights. *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002). As the *Macias* court stated:

> First, we must consider whether the prosecutor's conduct and remarks were improper. If we conclude that the remarks were improper, then we must apply the four-factor test set forth in *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994), to determine "whether the impropriety was flagrant" and thus violated the defendant's due process rights. The four factors are as follows: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3)

> whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). Before proceeding to the four factors of the *Carroll* test, we must first determine whether the prosecutor's statements were improper. Although a prosecutor is allowed "to argue reasonable inferences from the evidence," *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000), he or she is not allowed to misstate the evidence. *Carter*, 236 F.3d at 784. It is thus "improper for a prosecutor, during closing arguments, to bring to the attention of the jury any purported facts that are not in evidence and are prejudicial." *Byrd*, 209 F.3d at 535 (internal quotation marks omitted).

Id. at 452 (further citations omitted). Only if the comments were both improper and flagrant will the petitioner be entitled to relief. Thus, a habeas court must review alleged prosecutorial misconduct not to determine the prosecution's culpability, but whether or not, despite any alleged misconduct, the petitioner received a fair trial. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Mindful of the above law, the court now turns to Spisak's individual grounds for relief.

a. Eleventh Ground for Relief

In the Eleventh Ground for Relief, Spisak asserts the prosecutor improperly introduced the testimony of Ms. Beverly Murphy, unduly

prejudicing Spisak thereby. The court notes that Spisak raised this claim to the Ohio Supreme Court as Proposition of Law L. As such, the court will review the merits of the claim.

Murphy testified as a state rebuttal witness during mitigation. She was a prostitute with whom Spisak had a relationship. The state apparently sought Murphy's testimony to rebut Spisak's portrayal of their relationship as a romantic one. Dr. Bertschinger noted this fact as significant in arriving at his diagnosis because Spisak purportedly held a deep hatred for African-Americans yet maintained a relationship with Murphy, an African-American woman. Defense counsel objected to her testimony on the grounds that it did not rebut the evidence presented during the defense's case-in-chief – that Spisak was mentally ill. After a sidebar conversation, however, the trial court permitted Murphy's testimony.

On the witness stand, Murphy testified that the nature of her relationship with Spisak was "strictly business." When asked whether Spisak was mistaken in his belief that their relationship included anything more, Murphy replied, "Frank is definitely mistaken. Me and Frank never were girlfriends and boyfriends." (Tr. 2814.) On cross-examination, however, defense counsel attempted to demonstrate that a romantic relationship had developed. Although Murphy denied accompanying Spisak to specific places proffered by defense counsel, Murphy admitted that she may have misled Spisak:

> Q: All right, and do you ever, do you ever fake [a romantic interest] at all if

> you got a really rich trick? Do you kind of make him think that you like him and you'd like to be with him. . . ?
>
> A: Yes, I do. I like to have the repeat business so quite naturally I would put on an act for them.
>
> Q: Sure. And you put on an act for Frank, didn't you?
>
> A: Yes, I did.

(Tr. 2849.) Thus, Murphy admitted that she simulated affection for Spisak.

Respondent alleges in the Return of Writ, that Murphy's testimony was necessary to counter Dr. Bertschinger's assessment that the seemingly paradoxical relationship with Ms. Murphy evidenced his mental illness. Instead, Respondent alleges, utilizing Murphy's services was yet another method by which Spisak could exploit African-Americans. Spisak correctly notes, however, that on cross-examination the prosecutor questioned Dr. Bertschinger regarding the Spisak-Murphy relationship. Dr. Bertschinger responded that his diagnosis would remain unaltered regardless of the nature of their relationship.[17]

Because Dr. Bertschinger's diagnosis would not have changed if Murphy's depiction of her relationship with Spisak were correct, it appears her

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[17] Specifically, Dr. Bertschinger stated, "Whether he was with a black prostitute or someone that was a black prostitute that he was friendly with, none of that is consistent with the other side, if you will, of his history, do you see, hatred towards blacks." (Tr. 2605.)

testimony did not truly rebut Dr. Bertschinger's conclusions. Consequently, the trial court erred when it permitted Murphy to testify. The court will therefore treat this claim as a trial error claim, rather than one of prosecutorial misconduct.

Alleged error in the admission of evidence, standing alone, are not enough to entitle a petitioner to relief pursuant to 28 U.S.C. § 2254. Review of a state court's evidentiary ruling on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker*, 27 F.Supp.2d 952, 985 (W.D. Ky. 1998) (quoting *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994)); *see also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988) (holding "errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding")(citations omitted).

The court finds that although the testimony of Beverly Murphy was not particularly relevant to the state's rebuttal case, it was not sufficiently prejudicial to deny Spisak a fair trial. The testimony that both the prosecutor and defense counsel elicited from Murphy tended to establish that Spisak was misled by Murphy's conduct into believing their association extended beyond a business relationship. It is true that this fact has little to do with rebutting

the means by which Dr. Bertschinger arrived at his diagnosis. However, whether viewed as irrelevant or rebuttal testimony, Spisak did not suffer prejudice as a result. Because the admission of Murphy's testimony did not deny Spisak the right to a fair trial, the court finds the Ohio Supreme Court's decision to deny this claim was not unreasonable. Thus, this ground for relief is not well-taken.

b. Twelfth Ground for Relief

In the Twelfth Ground for Relief, Spisak asserts numerous instances of prosecutorial misconduct occurring during the mitigation phase prejudiced him. This claim is not procedurally defaulted because Spisak raised it as Proposition of Law XLIX to the Ohio Supreme Court. Thus, the court will address the merits of this claim.

Spisak alleges some instances of prosecutorial misconduct occurred during the prosecutor's cross-examination of Dr. Bertschinger. In an attempt to dispel Dr. Bertschinger's conclusion that Spisak's relationships with African-American women while espousing hatred against African-Americans was a symptom of his mental disease, the prosecutor asked Dr. Bertschinger whether he knew that Spisak wanted to be their pimp. (Tr. 2604.) Additionally, when asking Dr. Bertschinger to recount Spisak's homosexual activity, the prosecutor inquired if Spisak solicited men to engage in sexual encounters with him during the time he was cross-dressing. Dr. Bertschinger responded in the affirmative.

Spisak also contends that the prosecutor prejudiced the mitigation proceeding by referring to Dr. Markey's stricken testimony when re-cross-

examining Dr. Bertschinger. Upon questioning Dr. Bertschinger regarding his diagnosis, the prosecutor asked whether the doctor was aware that Dr. Markey initially drafted a report indicating Spisak had diminished capacity to refrain, but testified at trial that Spisak suffered from no mental disease or defect. (Tr. 2653.) Because Dr. Markey's testimony was stricken from the record, Spisak cites this reference to it as prejudicial.

Finally, Spisak lists pages of trial transcript corresponding to the prosecutor's closing argument as prejudicial. Because these page references coordinate with the transcript cites and explanation found in Spisak's brief on direct appeal to the Ohio Supreme Court, the court will assume that Spisak intended to articulate the identical arguments here. Specifically, the prosecutor disparaged the evidence presented by the defense as "insulting" and "mumbo jumbo." (Tr. 2950, 2952.) Moreover, Spisak alleges that the prosecutor's closing argument disparaged him by referring to him in derogatory terms, insinuating that Spisak lied, and likening him to a "rat" who hid in the basement, seeking to evade police detection. (Tr. 2941, 2955.) Spisak also contends the prosecutor unfairly commented that he would not have plead insanity had Coletta Dartt or John Hardaway been killed, (Tr. 2957), felt no remorse about shooting and injuring John Hardaway, (Tr. 2946), and was unable to support his wife and child. (Tr. 2943.)

As required by the law stated above, the court will analyze Spisak's claims in light of the totality of circumstances in the case. The court concludes that

while some prosecutorial comments to which Spisak objects may be repugnant, they did not deny Spisak due process or inject any fundamental unfairness into the trial. The court finds the Ohio Supreme court acted reasonably in denying this claim. Accordingly, Spisak's twelfth ground for relief not well-taken.

C. Grounds for Relief Relating to Petitioner's Appeals and Post-Conviction Review

1. Thirteenth Ground For Relief

In his Thirteenth Ground for Relief, Spisak asserts the ineffectiveness of his initial appellate counsel. The court will address this claim on the merits as it was raised to the Ohio Supreme Court as the LXI (61st) Proposition of Law.

As stated above, during Spisak's appeal to the Eighth District Court of Appeals, appointed counsel, who also served as Spisak's trial counsel, raised only one issue: Whether or not the trial court erred by ruling that before an expert doctor could testify before the jury that the expert doctor must have found the defendant-appellant to be "legally insane." On July 30, 1984, the Eighth District affirmed the conviction.

Counsel then filed a timely notice of appeal. Spisak then sued his counsel, which led the Ohio Supreme Court to permit the withdrawal of initial counsel and appoint the Ohio Public Defender to represent Spisak. Upon appointment, the public defenders assigned to the case filed three motions to remand to the Eighth District. The Ohio Supreme Court granted the first two motions to remand and

ordered the Court of Appeals to supplement the record, permit Spisak to participate in the review process, and reevaluate its decision based on the supplemented record. After holding two hearings, in which Spisak's new counsel participated, the Eighth District Court of Appeals again affirmed Spisak's convictions. *State v. Spisak*, No. 82884, slip op. (Ohio Ct. App. May 27, 1986). When Spisak moved for a third remand, however, the Ohio Supreme Court denied the motion. On November 24, 1986, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four Propositions of Law. After hearing these issues, the Ohio Supreme Court affirmed Spisak's conviction. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988).

Spisak now claims he was prejudiced by initial appellate counsel. Specifically, he asserts that initial appellate counsel should have raised the following claims on appeal:

> (1) Petitioner was convicted of four separate aggravated murders and nineteen separate aggravating circumstances when only three killings took place.
>
> (2) The Court allowed the jury to consider 19 separate aggravating circumstances without merging them thereby making the sentencing/weighing process totally unreliable.
>
> (3) Trial Court's exclusion of all expert (proffered) testimony on the insanity issue, including the method of excluding

the testimony of Dr. Markey in front of the jury.

(4) The Court's refusal to charge on insanity in spite of expert and lay testimony.

(5) Trial Court's exclusion of Petitioner's testimony of his delusional beliefs.

(6) The procedural errors in Petitioner's Motion to Suppress and the subsequent denial of the Motion. Additionally, failure to file a Motion to Suppress regarding the warrantless search of Ronald Reddish's automobile; residence; and Petitioner's property within same.

(7) Prosecutorial misconduct.

(8) The erroneous comments of the Trial Court and the Prosecutor that the jury's death verdict is only a recommendation.

(9) The exclusion of Thomas J. Schmitt from the jury.

(10) The use of Beverly Murphy as a rebuttal witness in the mitigation phase of the trial.

(11) Constitutionality of Ohio's death penalty statutes; statutorily mandated proportionality process.

(12) Failure of the Trial Court to require the presence of Petitioner when jurors were being excused during voir dire.

> (13) The Trial Court's order, without the benefit of an evidentiary hearing, that Petitioner appear before the jury shackled and the Trial Court's failure to instruct the jury regarding the Petitioner's shackles.
>
> (14) The Prosecutor's repeated use of witnesses who had no relevant testimony and who were called only for the purpose of evoking sympathy for the victims and their families.
>
> (15) The Prosecutor's repeated use of pictures, testimony and speculation to emphasize the horrible nature of the crimes for purposes of inciting the jury.
>
> (16) The Trial Court's failure to exclude evidence previously ruled inadmissible from the jury room during the jury's deliberations.
>
> (17) The Prosecutor's repeated use of prior acts of Petitioner for purposes of prejudicing and inciting the jury.
>
> (18) The failure of the Trial Court to properly instruct the jury in the mitigation phase.

Petition at 53-54.

A habeas petitioner may base his or her assertion of appellate counsel's ineffective assistance on one of two federal constitutional grounds: first, a petitioner may claim that he or she was actually or constructively denied counsel on appeal, denying his

or her Fourteenth Amendment due process right thereby. Second, and more typically, a habeas petitioner may assert that he or she was denied the Sixth Amendment right to effective assistance of counsel. As the court will discuss below, a reviewing court must undertake distinct analyses depending upon the alleged constitutional violation on which a petitioner bases his or her claim. In the instant case, Spisak argues alternatively that he was denied appellate counsel pursuant to a Fourteenth Amendment due process claim, and a Sixth Amendment right to effective assistance of counsel. The court now analyzes both claims distinctly, and finds that both are without merit.

The United States Supreme Court has determined that a criminal defendant has a Fourteenth Amendment due process right to effective assistance of counsel during the first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Anders v. California*, 386 U.S. 738 (1967) (requiring court to institute prophylactic procedure to safeguard defendant's right to appellate counsel when counsel determines no meritorious issues exist); *Douglas v. California*, 372 U.S. 353 (1963) (holding indigent defendant entitled to court-appointed counsel on first appeal as of right).

To succeed on a Fourteenth Amendment denial of appellate counsel claim, a petitioner must demonstrate that he or she was actually or constructively denied counsel on appeal. *Smith v. Robbins*, 528 U.S. 259, 286 (2000). Once a habeas court determines that the petitioner essentially acted without counsel on appeal, the court does not engage

in the effective assistance of counsel analysis announced in *Strickland v. Washington*, supra at 70 or harmless error analysis pursuant to *Chapman v. California*, 386 U.S. 18 (1967). Instead, a habeas court must presume that prejudice occurred, holding the appellate proceeding constitutionally infirm. *Penson v. Ohio*, 488 U.S. 75, 88 (1988).

Courts have found such a constitutional violation in limited instances, such as when counsel asked to withdraw or alerted the court that counsel could find no meritorious issues to raise on appeal. *See, e.g., Lombard v. Lynaugh*, 868 F.2d 1475, 1477 (5th Cir. 1989) (finding denial of effective assistance of appellate counsel when counsel submitted two-page brief to court indicating counsel could find no issues to raise on appeal although several patent trial errors existed); *Jenkins v. Coombe*, 821 F.2d 158, 159 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) (holding appellate counsel inadequate when counsel raised only sufficiency of evidence claim in five-page appellate brief). Conversely, when a defendant's appeal is subjected to "meaningful adversarial testing," then the appellate proceeding passes constitutional muster. *Carpenter v. Morris*, 914 F.2d 255 (TABLE), 1990 WL 126428, at *2 (6th Cir. Aug. 31, 1990).

In *Carpenter*, the Sixth Circuit held a habeas petitioner's due process right to appellate counsel was not violated although the petitioner retained new counsel in the midst of his first appeal. After initial appellate counsel raised only three issues, petitioner retained counsel who filed a motion for leave to amend the appeal and file a new appellate

brief containing ten new issues. The court of appeals denied the motion, but permitted petitioner's new counsel to participate in oral argument. The court of appeals upheld the conviction. Thereafter, new counsel timely filed an appeal to the Ohio Supreme Court containing the three issues initial counsel raised, the ten issues subsequent counsel attempted to raise in appellate court, and one new issue. *Id.* at * 1.

In affirming the District Court's denial of the writ, the Sixth Circuit determined that no due process violation had occurred on appeal. Noting the factual distinctions from *Penson v. Ohio, supra*, the Sixth Circuit emphasized that the petitioner was represented by counsel at all stages of appeal. Furthermore, the court noted that, "[p]etitioner did not attempt to change attorneys until after the briefing was completed. This request was granted, and the court of appeals invited new counsel to join in the next step of the proceedings, the oral argument. Thus petitioner was not denied the counsel of his choice on appeal." *Id.* at *2.

The court finds this case factually more akin to *Carpenter* than to *Lombard* or *Jenkins*. Spisak had, at all times, representation on appeal. The public defenders who represented Spisak were able to participate in two oral arguments before the Eighth District and raised sixty-four issues to the Ohio Supreme Court. These circumstances are not analogous to cases in which counsel withdrew, forcing the appellant to proceed pro se. Rather than viewing the petitioner's appeal from the vantage point of Spisak's initial brief filed in the Eighth

District Court of Appeals, the court believes it more appropriate to review the appellate process in its entirety when making a Fourteenth Amendment analysis. When doing so, the court cannot find that Spisak's due process rights were violated.

Spisak's claims that his Sixth Amendment right to effective assistance of appellate counsel was infringed is also not well-taken. Respondent contends that any traditional, Strickland claim must fail because Spisak cannot demonstrate prejudice as all claims he asserts initial appellate counsel should have raised were subsequently raised to the Ohio Supreme Court. Spisak counter-claims that, even under a Sixth Amendment, Strickland analysis, this court can presume prejudice, requiring him to demonstrate only that counsel's conduct was objectively unreasonable.

Spisak's assertion is a correct one. The Supreme Court has articulated, and recently revisited the issue of what circumstances dictate a presumption of prejudice. In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court reiterated the holding under Strickland, that a court may forego a prejudice analysis in only three categories of cases:

> First, . . . we presume prejudice in a case of denial of counsel. Second, various kinds of state interference with counsel's assistance can warrant a presumption of prejudice. Third, prejudice is presumed when counsel is burdened by an actual conflict of interest, . . . although in such a case we do require the defendant to show that

> the conflict adversely affected his counsel's performance.

Id. at 765 (citations and internal quotation marks omitted). In all other instances, the Court stated, "[w]e thus presume that the result of the proceeding on appeal is reliable, and we require [a defendant] to prove the presumption incorrect in his particular case." *Id.*

Because none of the factors enumerated above were present in Spisak's case, the court must analyze Spisak's claims under a traditional *Strickland* analysis, requiring Spisak to prove both that counsel acted objectively unreasonable and those actions prejudiced Spisak. *Strickland, supra.* Applying this analysis to claims of ineffective assistance of appellate counsel, Spisak must show that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate proceedings were unfair and the result unreliable. *Id.* at 687.

An appellant has no constitutional right to have every non-frivolous issue raised on appeal, *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel. *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990), *cert. denied*, 498 U.S. 1002 (1990). Moreover, an attorney is not compelled to present an argument on appeal for which there is no good-faith factual support merely to avoid a charge of ineffective assistance of counsel. *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986).

To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To satisfy the prejudice prong, the petitioner must show that his or her counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In the context of ineffective assistance of appellate counsel, a petitioner must demonstrate "that the direct appeal of (those) issuer s) (that appellate counsel did not raise) would likely have been successful." *Leggett v. United States*, 101 F.3d 702 (TABLE), 1996 WL 665580, at *2 (6th Cir. Nov. 14, 1996).

Spisak's claims clearly fail under the prejudice prong. With the exception of sub-claim (12), all the issues Spisak claims initial counsel should have raised on appeal were considered by this court and found to be without merit. Consequently, Spisak cannot demonstrate, as he must, that he was prejudiced by initial appellate counsel's omissions. Thus, Spisak was not denied a Sixth Amendment right to effective assistance of appellate counsel.

Finally, Spisak claims that the Ohio Supreme Court did not provide him a sufficient review of the claims he asserted to that court. Thus, Spisak argues, the Ohio Supreme Court "did not render harmless trial counsel's ineffectiveness at the initial appellate level." Traverse at 109. Moreover, Spisak contends, he was denied the right to two levels of

direct appeal as afforded to him pursuant to Ohio Rev. Code § 2929.05. The court finds these claims are not cognizable in a federal habeas proceeding as they present issues of state law only. 28 U.S.C. § 2254. This court must ensure, as the previously cited law dictates, that Spisak's due process and effective assistance of counsel rights have been protected. As it finds they have been, the court's inquiry ends. Accordingly, the court finds the Ohio Supreme Court did not unreasonably decide this claim and Spisak's thirteenth ground for relief is not well-taken.

2. Fourteenth Ground For Relief

In his fourteenth ground for relief, Spisak contends that trial counsel and the trial court failed to maintain a complete record during each stage of the trial proceeding. Specifically, Spisak alleges the following proceedings contained specified numbers of unrecorded bench or side-bar conferences: (1) thirty-four (34) instances during voir dire; (2) one instance during the competency hearing; (3) three instances during the motion to suppress proceedings; (4) fifty-nine (59) during the guilt phase of trial; and, (5) fifteen (15) during the mitigation phase. The court finds these claims are not procedurally defaulted as they were raised as Propositions of Law IX, XX, XXII, and XLVII to the Ohio Supreme Court. Thus, the court will address this claim, in its entirety, on the merits.

Rule 22 of the Ohio Rules of Criminal Procedure requires all proceedings to be recorded in all serious offense cases, and Ohio Appellate Rule 9(A) requires, "[i]n all capital cases the trial proceedings shall include a written transcript of the

record made during the trial by stenographic means." Ohio App. R. 9(A). When a proceeding has not been preserved, counsel may invoke procedures set forth in Ohio Appellate Rules 9(C) or 9(E) to reconstruct the record. Under Ohio law, an error is considered waived in the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice. *State v. Jells*, 559 N.E.2d 464 (Ohio 1990), *cert. denied*, 498 U.S. 1111 (1991) (citing *United States v. Gallo*, 763 F.2d 1504, 1529-32 (6th Cir. 1985), *State v. Brewer*, 549 N.E.2d491 (Ohio 1990) cert. denied, 475 U.S. 1017 (1986)).

Upon review of the record, it is clear that Spisak was not denied a fair trial. Lundy v. Campbell, 888 F.2d 467 (6th Cir. 1989). Spisak has failed to set forth any evidence to support a finding that he was denied a fair trial simply because some side-bar conferences were not placed on the record. Other than mere assertion, Spisak does not provide the court with specific information that would support a claim he was prejudiced by the trial court and counsel's failure to make a recording of the bench and side-bar conferences. A mere assertion is not enough to support a finding that the failure to record these conferences resulted in an unfair trial.

Any error by the trial court would have been harmless. Adopting the test in *Kotteakos v. United States*, 328 U.S. 750 (1946), the Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), held that the test for harmless error is whether the error had a "substantial and injurious effect" on the jury's verdict. Thus, a petitioner must establish that the error resulted in "actual prejudice." *Brecht*, 507 U.S.

at 637 (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)); *see also Chapman v. California*, 386 U.S. 18 (1967). Spisak has failed to make such a showing of actual prejudice. Consequently, the court finds the Ohio Supreme Court reasonably denied this ground for relief. Thus, Spisak's fourteenth ground for relief is not well-taken.

3. Fifteenth and Sixteenth Grounds For Relief

In his Fifteenth and Sixteenth grounds for relief, Spisak claims that the Eighth District Court of Appeals caused the ineffective assistance of appellate counsel when it refused to hear new counsel's proposed supplemental claims. Additionally, Spisak contends the Ohio Supreme Court infringed on his due process rights when it: (1) summarily denied his claim that the jury was prejudiced by the trial court's charging the jury on nineteen specifications; (2) improperly weighed the mitigating factor of his diminished capacity under the same standard as an insanity defense; and, (3) provided him with an inadequate appellate review. These facts, Spisak argues, entitle him to a presumption of prejudice for which this court should grant relief. The court finds that neither of these claims are procedurally defaulted as they were raised as grounds for relief Fifty-Seven (57) and Fifty-Nine (59) respectively in Spisak's post-conviction relief petition, the earliest point at which Spisak could have raised these claims. As such, the court will conduct a merit review of both claims.

Spisak complains that the appellate review process both caused his new appellate counsel's ineffectiveness and was inadequate, violating due

process. As stated in section I., *supra*, Spisak's first appointed counsel timely appealed his convictions to the Ohio Court of Appeals for the Eighth District, raising only one issue. The Court of Appeals affirmed the conviction after vacating the aggravated murder conviction on the fifth count of the indictment as well as the five specifications attached thereto. *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992 (Ohio Ct. App. July 19, 1984).

Thereafter, Spisak received new counsel from the Ohio Public Defender Commission, who filed three motions to remand. The Ohio Supreme Court granted the first two motions to remand and ordered the court of Appeals to supplement the record, permit Spisak to participate in the review process, and reevaluate its decision based on the supplemented record. The portion of the record missing from the first appeal was the record of Spisak's competency hearing. Once the record was complete, the Ohio Supreme Court remanded the case back to the Eighth District with instructions to the Eighth District "that counsel for Appellant be permitted to participate in the review process as required by the Sixth and Fourteenth Amendments of the United States Constitution." Petition at 61.

On remand, the Eighth District held two hearing on January 3 and February 6, 1986, to comply with the Ohio Supreme Court's order. The Eighth District would not, as Spisak requested, permit counsel to re-brief fully additional issues, stating that an appellant should not be entitled to a new appeal merely because he or she receives new counsel. Notwithstanding this admonition, the

Eighth District permitted new counsel to submit a twenty page brief on whether Spisak's sentence was proportional to other capitally sentenced individuals. On May 27, 1986, the Court of Appeals again affirmed Spisak's convictions. *State v. Spisak*, No. 82884, slip op. (Ohio Ct. App. May 27, 1986). Thereafter, Spisak moved the Ohio Supreme Court for a third remand, however, the court denied the motion. On November 24, 1986, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four Propositions of Law. The Ohio Supreme Court affirmed Spisak's conviction in a four-and-a-half page decision on Aprill3, 1988. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988).

As stated in Spisak's thirteenth ground for relief, once a state affords a criminal defendant the right to appellate review, the state court must conduct that proceeding consistent with due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The United States Supreme Court has approved death penalty schemes that require "the state supreme court [to review] the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate." See *Zant v. Stephens*, 462 U.S. 862,876 (1983) (noting approval of Georgia's capital punishment scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976)). The purpose of requiring this review is to avoid a capricious imposition of the death penalty in favor of a capital punishment scheme that levies capital punishment in a rational, consistent manner. *Barclay v. Florida*, 463 U.S. 939, 960 (1983). Thus, the Court has given state courts discretion to implement capital case appellate review so long as the courts are systematic in their approach.

To analyze these claims, the court will examine the appellate process afforded Spisak in state court *en total*. Initially, the court already has found in Spisak's fifth ground for relief that the trial court committed harmless error when it permitted the jury to consider nineteen specifications when determining its verdict. Thus, this court, independent of the Ohio Supreme Court, concludes that Spisak's due process rights were not violated by the trial court's failure to merge. Furthermore, the court disagrees with Spisak's factual assertion that the Ohio Supreme Court improperly utilized the test for legal insanity when weighing the diminished capacity mitigating factor. Instead, the Ohio Supreme Court in its re-weighing process merely repeated the language contained in the statute relating to mitigating factors.[18]

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[18] That statute provides:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt. . . the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> ***
>
> (3) Whether, at the time of the committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law;

Ohio Rev. Code § 2929.04(B)(3). *Cf. State v. Spisak*, 521 N.E.2d 800, 803 (Ohio 1988)("Of the mitigating factors. . appellant relied solely on his allegation that he lacked, due to a mental

The court also determines that Spisak was provided a constitutionally sound review as both the Eighth District Court of Appeals and the Ohio Supreme Court rendered opinions only after re-weighing Spisak's sentence for proportionality purposes. While Spisak correctly asserts that the Ohio Supreme Court disposed of his claims in summary fashion, this type of review is distinguishable from failure to review. The Ohio Supreme Court disposed of all sixty-four claims, inmost instances, with citations to state law, yet it performed its re-weighing function properly and sufficiently articulated its finding as to the appropriateness of the death penalty when it stated:

> Of the mitigating factors specified in R.C. 2929.04(B) appellant relied solely on his allegation that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3). Although there was testimony that appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, established that appellant was sane at the time of the acts, that he could have

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disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses.").

refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.

Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond a reasonable doubt, on the side of the aggravating circumstances of which appellant was convicted.

Finally, considering all our prior decisions affim1Ing a sentence of death, appellant's sentence was not arbitrarily, freakishly or capriciously applied, and is not disproportionate to such prior sentences. Although the majority of such decisions involved a single victim, in *State v. Brooks*, (1986), 25 Ohio St.3d 114, 25 OBR 190, 495 N.E.2d 407, we affirmed a death sentence involving the murder of defendant's three sons. In the

> case sub judice, the sentence of death was properly imposed upon appellant.

State v. Spisak, 521 N.E.2d at 803-04. The Eighth District Court of Appeals also independently reweighed the sentence. *State v. Spisak*, Nos. 47458, 47459, 1084 WL 13992, at * 7-8 (Ohio Ct. App. July 19,1984).

Although it would have been beneficial to the review process to have a more elaborate articulation of the reasons for which the Ohio Supreme Court denied Spisak's substantive claims for relief, a federal habeas court has no ability to mandate such amplification. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Because the Ohio Supreme Court summarily addressed the merits of Spisak's claims, this court does not afford its determination a presumption of correctness. Thereafter, the court has conducted an independent review under the standard required in 28 U.S.C. § 2254(d). Thus, Spisak has benefitted from the Ohio Supreme Court's brevity. Consequently, his argument that his due process rights were violated by the Supreme Court process is not well-taken. Finally, Spisak cites to *Swenson v. Bosler*, 386 U.S. 258 (1967), for the proposition that a statutory right to appeal is not satisfied when an appellate court independently reviews the trial transcript for error, without benefit of appellate counsel. That case, however, is easily distinguishable. In *Swenson*, the petitioner had no counsel whatsoever on appeal and was forced to write a pro se appellate brief. While the state court of appeals claimed it independently reviewed the record for trial error, the Supreme Court determined that

the benefit of appellate counsel is so substantial, that indigency should not preclude such representation despite the appellate court's assurances. Spisak, however, at no time during the appeal was without counsel. On the contrary, Spisak's counsel presented a noteworthy number of claims to the Ohio Supreme Court for review. Contrary to Spisak's assertions, he received an appellate review that afforded him due process. While not providing sufficient detail to which this court can defer, the Eighth District court of Appeals and the Ohio Supreme Court provided Spisak with a constitutionally adequate review process. Accordingly, Spisak's fifteenth and sixteenth grounds for relief are not well-taken.

D. Grounds for Relief Relating to Search and Seizure Evidence

In grounds for relief seventeen, eighteen, and nineteen, Spisak contends that items introduced during trial were obtained unlawfully because the police officers who obtained such evidence did so without a warrant. The court finds none of these claims procedurally defaulted. These claims were raised as Propositions of Law XI, XII, and XII to the Ohio Supreme Court on direct appeal. Accordingly, the court will address them on the merits.

In his Petition, Spisak alleges that he was a resident of 1367 East 53rd Street on September 4, 1982. On that date, Cleveland Police Sergeant George and other officers received a police radio announcement that someone had discharged a firearm in Spisak's apartment. The officers arrived at Spisak's apartment and knocked on the door. Spisak admitted that he was shooting a gun out the

window. Thereafter, Sergeant George demanded to know where the gun was and Spisak pointed to the living room. The officers then entered the apartment and searched it, finding several guns in the apartment.

On September 6, 1982, after acting on an anonymous tip, police arrested Spisak and Ronald Reddish at Reddish's home. The officers conducted a search of Reddish's home and found Spisak's suitcase. Inside the suitcase police found the pager belonging to Timothy Sheehan. Sometime thereafter, the police searched Reddish's 1975 Buick LeSabre.

Before trial, Petitioner's counsel moved to suppress the weapons police found at Spisak's apartment. After hearing testimony from Sergeant George and Spisak, the trial court denied the motion.

1. Seventeenth Ground For Relief

In Spisak's seventeenth ground for relief, he alleges that the weapons police obtained from his apartment on September 2, 1982, were the products of an illegal search and seizure. Respondent correctly asserts in the Return of Writ, however, that this claim is not cognizable in a habeas proceeding pursuant to *Stone v. Powell*, 428 U.S. 465 (1976).

In *Stone*, the Supreme Court held that Fourth Amendment search and seizure claims, or claims invoking the exclusionary rule under *Mapp v. Ohio*, 367 U.S. 643 (1961), are not cognizable in federal habeas proceedings "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." Stone, 428 U.S. at 482. Noting that the exclusionary rule is not a personal

constitutional right but a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect," the Court reasoned that it would be of little effect to exclude such claims on collateral review. *Id.* at 486 (citations and internal quotation marks omitted).

Because Spisak was afforded a "full and fair review" of this claim by both the trial and Ohio Supreme Court, it falls directly within the purview of claims Stone sought to exclude from habeas review. Consequently, the Ohio Supreme Court correctly determined that Spisak's seventeenth ground for relief is not meritorious.[19]

2. Eighteenth and Nineteenth Grounds For Relief

Spisak asserts that evidence obtained in Reddish's apartment and automobile also violated his Fourth Amendment rights. Spisak asserts these claims elude the scope of Stone as they are asserted as ineffective assistance of counsel claims for failing to move to suppress this evidence; and further, that introduction of this evidence should be considered with other cumulative error claims pursuant to the Fourteenth Amendment right to due process.

Indeed, the Supreme Court has placed limits on the scope of Stone's Fourth Amendment claim prohibition. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court determined that the prohibition against asserting Fourth Amendment claims in a

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[19] The court also notes that Spisak did not reply to Respondent's assertion in the Traverse.

habeas proceeding does not preclude a petitioner from asserting a Sixth Amendment ineffective assistance of counsel claim for failing to raise such a claim in state court. Similarly, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court determined that a petitioner may assert a Fourteenth Amendment due process claim even if that claim is based on a Fourth Amendment search and seizure issue.

In the instant case, however, such assertions lack merit. First, as stated above, to prove an ineffective assistance of counsel claim a habeas petitioner must demonstrate both that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that he or she was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. at 687. In the instant case, Spisak cannot show that he was prejudiced by the admission of any evidence during trial. Spisak admitted to the murders during his trial testimony. Thus, the exclusion of evidence obtained in Reddish's home or automobile would not have effected the trial's outcome. Spisak cannot claim, consequently, that his counsel was ineffective for raising such issues.

Spisak has not demonstrated that counsel's failure to file a motion to suppress was objectively unreasonable. At the time of Spisak's trial, the Supreme Court had determined that:

> 'In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of

> a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.'

Alderman v. United States, 394 U.S. 165, 173 (1969)(quoting *Jones v. United States*, 362 U.S. 257, 261 (1960)).[20]

Spisak fails to articulate clearly which interest he had in Reddish's automobile and the precise evidence which was seized from it. In his Petition, Spisak merely asserts that "[t]he seizure and search

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[20] Although the Supreme Court later decided in *Minnesota v. Olson*, 495 U.S. 91 (1990), that a criminal defendant has standing to assert a Fourth Amendment search and seizure claim if he or she is an overnight guest, this case is inapplicable. While Spisak implies in the Petition that he had obtained overnight guest status at the time police discovered him, he admitted during trial that he had not moved from his 53rd Street residence. (Tr. 27.) Thus, he was not an overnight guest and had no standing to object to the introduction of the items seized. *See United States v. Pollard*, 215 F.3d 643,648 (6th Cir. 2000) (holding co-defendant did not possess standing to assert Fourth Amendment claim when he had never before visited the premises); *United States v. Hiles*, 908 F.3d 974 (TABLE), 1990 WL 106174, at *3 (6th Cir. July 27, 1990) (distinguishing Olson even when defendants had entry access to apartment in which search conducted because defendants exercised no "dominion or control" over premises at time of search). See also *State v. Williams*, 652 N.E.2d 721, 733 (Ohio 1995) (determining defendant had no "reasonable expectation of privacy" in apartment belonging to another individual although he placed some personal items on premises).

of the 1975 Buick LeSabre in which Petitioner claimed an interest was illegal." Petition at 72. Spisak fails to provide the court with essential facts, such as what items belonging to Spisak police procured during the search and which items were introduced during trial. A criminal defendant has no standing to bring a Fourth Amendment claim pursuant to an automobile search without demonstrating that he or she was the owner of the automobile or property within it. *Rakas v. Illinois*, 439 U.S. 128 (1979). Because Spisak fails to articulate how counsel's failure to file a motion to suppress these items was unreasonable, this claim also must fail.

As neither claim is meritorious, Spisak also cannot demonstrate that he was denied due process as a result of cumulative error. The Ohio Supreme Court was not unreasonable in denying these claims. Accordingly, Spisak's eighteenth and nineteenth grounds for relief are not well-taken.

E. Grounds for Relief Relating: to "Other Acts" Evidence

1. Admission of Evidence

In grounds for relief twenty, twenty-one, and twenty-two, Spisak alleges his Fourteenth Amendment right to due process and a fundamentally fair trial were infringed by the trial court's decision to admit evidence Spisak claims was irrelevant to the state's case. The court finds none of these claims procedurally defaulted as they were raised to the Ohio Supreme Court as Propositions of Law XXXIX, XL, XLI, and XL VII. As such, the court will address these claims on their merits.

As stated above, alleged errors in the admission of evidence, standing alone, are not enough to entitle a habeas petitioner to relief pursuant to 28 U.S.C. § 2254. Review of a state court's evidentiary ruling on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial.'" *Skaggs v. Parker*, 27 F.Supp.2d 952, 985 (W.D. Ky. 1998) (quoting *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994)); *see also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1 988)(holding "errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding") (citations omitted).

"To determine whether the admission of certain evidence violated the defendant's constitutional right to a fair trial, the habeas court must first determine whether the evidence is relevant or probative of an issue on which the prosecution bears the burden of proof." *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991)). If the court concludes that the evidence was relevant to an essential element of the state's case, its inquiry is over; by definition, there has been no due process violation. *Id.* A federal habeas court cannot vacate a state court judgment merely because it would have concluded differently. *Lundy v. Campbell*, 888 F .2d 467, 470 (6th Cir. 1989).

Mindful of the above deference with which this court must review the trial court's evidentiary rulings, the court now turns to Spisak's individual grounds for relief.

a. Grounds For Relief Twenty and Twenty-One

In the above grounds for relief, Spisak claims the trial court erred when it admitted numerous items into evidence that he argues were unrelated to the crimes with which he was charged. First, the police seized, and the prosecution introduced, firearms that Spisak owned but were not used to commit any of the crimes.[21] Additionally, Spisak objects to the state's introduction of Nazi paraphernalia and related evidence.[22] The court finds that the trial court did not violate Spisak's Fourteenth Amendment right to a fair trial by allowing the introduction of such evidence. Both types of evidence support facts that the state sought to prove - that these murders were precalculated and

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[21] Spisak contends that the following firearms and fireall1i-related material was introduced into evidence though unrelated to the crimes with which he was charged: (1) Erma Excam gun; (2) Shotgun; (3) parts of a gun; (4) loaded shotgun; (5) .22 caliber 14 semi-automatic sturm ruger; (6) Glenfield Model 60, .22 caliber semi-automatic rifle, loaded; (7) Colt .45 semi-automatic pistol; (8) ammunition; (9) Schematic drawing of Erma Excam Automatic pistol; (10) Copy of magazine article with test Reports of the Erma Excam; and, (11) replica of German semi-automatic pistol. Petition at 74-75.

[22] Spisak alleges he was denied a fair trial because of the introduction of the following evidence: (1) Anarchist Cookbook; (2) Adolf Hitler Book; (3) Nazi Flag; (4) Harley Davidson wallet with Hell's Angel's Emblem; (5) Welfare Card; and, (6) suitcase containing items of clothing with swastika and cross armband with Nazi emblem. Petition at 76.

motivated by Spisak's white supremacist beliefs. Because the court finds the admission of such evidence probative, the Ohio Supreme Court was not unreasonable in denying this claim. Thus, Spisak's twentieth and twenty- first grounds for relief are not well-taken.

b. Twenty-Second Ground For Relief

In this ground for relief, Spisak argues that various uncharged acts of violence, such as thoughts about killing his wife, daughter, and wife's family as well as killing an African-American woman in an elevator and threatening to kill a Jewish attorney, were improperly admitted. However, the court finds the admission of this evidence did not affect Spisak's right to a fair trial.

During trial, the prosecution introduced evidence that Spisak had pointed a loaded gun at his ex-wife's head, had cocked the gun, but refrained from pulling the trigger. Spisak also had been involved in an altercation with his ex-wife's father. Finally, the state called Officer Timothy Patton, who testified about statements Spisak had made to police after arrested. Officer Patton testified that one evening, while on the Cleveland State University campus, a meeting was taking place to discuss the killings. Spisak told Patton that a security officer asked Spisak to exit the area, for security purposes, where Cleveland State officials were meeting. Officer Patton testified that Spisak indicated that at that point, he decided to kill an African-American woman on an elevator near the meeting so that the officials would be confronted with her body after the meeting. His plans were interrupted, however, when a white

person boarded the elevator on a subsequent stop (Tr. 1160-61). The state proffered the above evidence because each of these incidents occurred between the dates of the Rickerson and Warford murders. By introducing instances in which Spisak contemplated murder yet was able to refrain, the state was attempting to demonstrate that, contrary to Spisak's allegations, he was able to quell his urge towards violence when he desired. Thus, this evidence tended to rebut Spisak's insanity plea.

Spisak also argues that because defense counsel did not object to these claims, the court should consider this as part of Spisak's ineffective assistance of counsel claims. This argument is not well-taken. Defense counsel's failure to object to the introduction of this evidence during trial was not objectively unreasonable pursuant to *Strickland, supra,* because it was relevant to the state's case. Thus, the court finds Spisak's twenty-second claim was not unreasonably decided by the Ohio Supreme Court and not well-taken.

2. Prosecutorial Misconduct

In his twenty-third, twenty-fourth, and twenty-fifth grounds for relief, Spisak asserts he was denied the Fourteenth Amendment right to a fair trial because of prosecutorial misconduct. None of these claims are procedurally defaulted as they were raised as Propositions of Law II, XLV, and XLVI respectively to the Ohio Supreme Court. Although the court will address the factual background of each claim individually, the court notes that each claim is governed by the identical law.

As stated earlier, to successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnely v. DeChristoforo*, 416 U.S. 637, 642 (1974)). This question must be answered in light of the totality of circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467,473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990).The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989) (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

The Sixth Circuit has utilized a four-part test to determine whether the prosecutor's conduct is egregious: A court should consider: (1) the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proofs introduced to establish the guilt of the accused. *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002). Prosecutors must have considerable latitude in presenting arguments to the jury and reversal should not occur even though the prosecutor's conduct was inappropriate unless prejudicial error is present. *Id.* Mindful of the above law, the court now turns to Spisak's individual grounds for relief.

a. Twenty-Third Ground For Relief

In his twenty-third ground for relief, Spisak asserts that the prosecutor unfairly cross-examined him about "other acts" unrelated to the crimes charged.[23] Subjecting these remarks cumulatively to the *Heinish* test, the court finds that they do not transgress the bounds of fairness. Indeed, Spisak introduced the very topics which were the subject of the cross-examination to which he objects. Spisak introduced evidence regarding his sexual behavior, Spisak introduced such evidence to demonstrate that his identity crisis, and subsequent drive to suppress his sexual orientation by affiliating with the White People's Party, was one factor indicating his insanity. Similarly, Spisak raised the issue of his political and religious beliefs in an effort to show that God intended that he kill African-Americans. Because Spisak raised these issues, he cannot cry foul when the prosecutor subjects them to cross-examination.

Other remarks, such as the prosecutor's remarks that Spisak was a coward, may be objectionable and of little probative value, but those remarks were isolated and not cumulatively prejudicial. Finally, the strength of the evidence on

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[23] Specifically, Spisak complains that the prosecutor unfairly raised the following topics during cross-examination: (1) that Spisak was a pimp; (2) Spisak's bizarre religious and political beliefs; (3) Spisak's receipt of public assistance; (4) Spisak's failure to support his family; (5) Spisak's homosexuality; (6) Spisak was a male prostitute; (7) Spisak could not sexually satisfy his wife; (8) Spisak's assaultive actions against his wife; and, (9) Spisak was a coward. Petition at 78.

which Spisak was convicted, such as his confessions to the crimes and the painstaking details he gave as to his motivation, diminish the prejudicial effect of any unnecessary remarks. Accordingly, the court finds that the Ohio Supreme Court's decision on this claim was not unreasonable. As such, Spisak's twenty-third ground for relief is without merit.

b. Twenty-Fourth Ground For Relief

In his twenty-fourth ground for relief, Spisak contends the prosecutor provided unsworn testimony and permitted a witness to do the same. While attempting to impeach Spisak, the prosecutor questioned him regarding an alleged high school incident in which a white female classmate was dating an African-American male. The prosecutor's purpose for this line of questioning was to attempt to demonstrate that Spisak's Nazi beliefs were longstanding, and not the product of mental illness:

> Q: During high school, then, there was an incident, was there not, where one of the girls had a black boyfriend?
>
> A: I don't remember that.
>
> Q: You don't remember?
>
> A: As I said, there were no black people out there where I went to school.
>
> Q: Do you remember. . . that you were in high school and a young girl had a black boyfriend and you told her not to ever bring that man back?

> A: That incident never happened. That was manufactured by the news media people for propaganda purposes.

(Tr. 1579-80.) In an effort to impeach this testimony, the prosecutor brought the woman with whom the alleged incident occurred and asked her to stand in the courtroom:

> Q: Mr. Frank Spisak, do you recognize that young lady wearing the glasses as Marrianne Lewandowski?
>
> Marrianne Nemerosky: Marrianne Nemerovsky. N-e-m-e-r-o-v-s-k-y.
>
> Q: I'm sorry. Marrianne Nemerovsky, do you recognize this lady as the young lady you went to Midpark High School with and graduated from?
>
> Mr. Shaughnessy: I object to the lady testifying without being sworn, your honor.
>
> A: I never saw her before in my life.
>
> The Court: Okay. Put another question and go to another subject.

(Tr. 1824.)

The court cannot find that the above dialogue constitutes "unsworn testimony" by the prosecutor or Ms. Nemerovsky that would in any way prejudice Spisak. The prosecutor's attempt to impeach Spisak's testimony, albeit unsuccessful, did not mislead the jury. Moreover, the trial court swiftly interceded before Ms. Nemerovsky could do more than correct

the pronunciation of her name. Thus, while Spisak may object to her testimony, he cannot claim that he was prejudiced thereby. Because the court finds that this incident is not an infringement on Spisak's right to a fair trial, the court also finds the Ohio Supreme Court did not unreasonably decide this claim. As such, Spisak's twenty-fourth ground for relief is not well-taken.

c. Twenty-Fifth Ground For Relief

In this ground for relief, Spisak cites numerous pages of transcript for the proposition that the prosecutor improperly "testified" regarding Spisak's religious and political beliefs. The court disagrees with this characterization. A review of these pages reveals numerous instances in which the prosecutor questioned Spisak's religious and political beliefs ideals that Spisak put into issue when asserting his insanity defense. Nothing in the nature of these remarks, once again, could be characterized as "testimony" from the prosecution. Rather, the questions that the prosecutor asked Spisak were part of a rigorous cross-examination. Certainly there were instances in which the defense counsel objected, and the court sustained, some of the state's questions. At no point in the cited transcript, however, can the court conclude that such cross-examination was the equivalent of "unsworn testimony." Thus, the Ohio Supreme Court properly denied this claim and this court finds it is not well-taken.

F. Grounds for Relief Relating to Admission of Exhibits Into Evidence

1. Twenty-Sixth Ground For Relief

In his twenty-sixth ground for relief, Spisak contends that the trial court, after first excluding without comment some of the state's proffered evidence, permitted such evidence to reach the jury during deliberations.[24] The Court finds that this claim is not procedurally defaulted as it was raised as the XXXIII (33rd) Proposition of Law to the Ohio Supreme Court. Accordingly, the court will address this claim on the merits.

Respondent does not dispute the veracity of Spisak's factual allegations. Instead, Respondent asserts that any error occurring from the submission of this evidence to the jury was harmless. The court agrees. The United States Supreme Court has determined that not all error, including constitutional error, necessitates conviction reversal. *Rose v. Clark*, 478 U.S. 570, 576 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The Court has differentiated between cases in which "structural" defects occurred, undermining a reviewing court's confidence in the outcome of the proceeding, and

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[24] Spisak lists the following items as excluded during trial yet submitted to the jury as it began deliberations:

(1) three coroner's photographs of Reverend Rickerson

(2) four crime seen photographs of Reverend Rickerson

(3) Sheehan family photograph

(4) Statement of Betty Braun

(5) two photographs of Mr. Warford

(6) booking slip for Spisak

Petition at 82-83.

those in which trial error occurred, but the constitutional integrity of the proceeding remained intact. *Neder v. United States*, 527 U.S. 1, 8 (1999). In *Neder*, the Court determined that the trial court's omission of a jury instruction on an element of the offense was subject to a harmless error test. *Id.* at 15. The *Neder* defendant was indicted for tax violation offenses which required a false statement as a material element of the crime. *Id.* at 6. The trial court incorrectly instructed the jury that it need not consider materiality to reach its verdict, believing the issue of materiality was a matter for judicial determination. *Id.*

The Court concluded that this error should be subject to a harmless error analysis. The Court opined that most constitutional errors can be reviewed under the hamiless error test, with only a limited class of cases involving constitutional error rising to a level of "structural" defect. *Id.* at 8. *See, e.g., Waller v. Georgia*, 467 U.S. 39 (1984)(denial of public trial); *McKaskle v. Wiggins*, 465 U.S.168 (1984) (denial of self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased judge presided at trial).

The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether the "error had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted). When a reviewing court is in "grave doubt" or

equipoise about whether the error affected the jury's verdict, the court must conclude that the error did affect it. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

First, the court determines that although the trial court improperly permitted some excluded evidence to reach the jury, this error cannot be classified "structural" error. When undertaking a factual comparison between the error occurring in the above-cited cases, such as a complete denial of counsel or self-representation, the court finds that permitting the jury access to the excluded evidence does not rise to that level of error. Thus, the court will subject the trial court's error to a harmless error test.

In doing so, the court finds the introduction of the above-listed items was harmless beyond a reasonable doubt. Spisak admitted in several days of testimony that he committed three murders and attempted two others. Thus, the issue of his guilt was not in question. The jury was not asked to determine who had committed these acts, but whether these acts were committed by one who is insane and should therefore escape criminal liability. The court is, therefore, hard-pressed to find harmful error in the fact that the jury may have viewed some photographs and other evidence tending to depict these acts. Spisak argues, however, that the prejudicial effect of providing access to these items was not merely confined to the guilt phase, but had a "carry-over" effect to the penalty phase of trial. The court disagrees. The jury is presumed to follow the trial court's instructions. *Greer v. Miller*, 483 U.S.

756, 767 n.8 (1987); *Holmes v. City of Massilon, Ohio*, 78 F.3d 1041 (6th Cir. 1996), *cert. denied*, 519 U.S. 935 (1996). The trial court properly instructed the jury regarding aggravating circumstances and mitigating factors. Spisak's bare allegations that the jury was unable to follow this instruction is not supported by any evidence. The Ohio Supreme Court reasonably denied this claim. Thus, Spisak's twenty-sixth ground for relief is not well-taken.

2. Twenty-Seventh Ground For Relief

In the twenty-seventh ground for relief, Spisak asserts that the trial court improperly admitted gruesome photographs of the victims contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments. This claim is not procedurally defaulted as it was raised as Proposition of Law XXXII on direct appeal to the Ohio Supreme Court. Thus, the court will address the merits of the claim. In this ground for relief, Spisak alleges that multiple photographs introduced during trial were unduly prejudicial, thereby denying him the right to a fair trial. Specifically, Spisak alleges that the trial court should have excluded the following photographs:

> (1) Five coroner's photographs of Reverend Rickerson
>
> (2) Five photographs of Reverend Rickerson at Cleveland State University
>
> (3) Fifteen photographs of Reverend Rickerson's clothing
>
> (4) Two photographs of Mr. Hardaway at the crime scene

(5) Three coroner's photographs of Mr. Sheehan

(6) Fourteen photographs of Mr. Sheehan's clothing

(7) Eleven photographs of Mr. Sheehan at Cleveland State University

(8) Fifteen photographs of Mr. Warford at the crime scene

Petition at 84-85.

As the court stated previously, admission of evidence is a matter of state law and alleged error, such as improper admission of evidence, usually does not support a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). A state law violation, however, may rise to the level of a due process violation if it created a serious risk of convicting an innocent person. *Neumann v. Jordan*, 84 F.3d 985, 987 (7th Cir. 1996). A federal court must defer to the state court's interpretation of its own rules of evidence and procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988). A federal court does not act an as an additional court of appeals to review a state court's interpretation of its own laws. *Id.*

The admission of the photographs Spisak alleges are prejudicial was within the sound discretion of the trial court. Admission of gruesome photographs in a murder case typically does not justify collateral relief, even if cumulative and likely to inflame the jury. *Gonzalez v. DeTella*, 127 F .3d 619, 621 (7th Cir. 1997), cert. denied, 523 U.S. 1032 (1998). There is no evidence in this case, other than

Spisak's mere allegation, that the introduction of the photographs violated his right to a fair trial. The Ohio Supreme Court correctly denied this claim on direct appeal. Thus, the court finds Spisak's twenty-seventh claim is without merit.

G. Grounds for Relief Relating to Fair Trial Issues

1. Twenty-Eighth Ground For Relief

Spisak asserts in his twenty-eighth ground for relief that the prosecutor improperly impeached him during trial by commenting on his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). The court notes that this claim was raised as Proposition of Law XLIV to the Ohio Supreme Court and, thus, is not procedurally defaulted. Accordingly, the court will address the claim on the merits.

During the prosecutor's cross-examination of Spisak, he made the following comments regarding Spisak's initial unwillingness to communicate with police:

> Q: You went to jail and the detective talked to you and, of course, George Rockwell, or whatever his name is, was killed by, I suppose, another patriot in 1967, and he tells you don't talk to the police.
>
> A: That's right.
>
> Q: And that's initially what you didn't do, you didn't talk to the police initially?
>
> A: Initially.

> Q: Right. Then once you got your story straight in your mind what you wanted to tell them
>
> Mr. Shauglmessy: Objection.
>
> The Court: Overruled.
>
> Q: You began to talk to the police?
>
> A: I made the decision to talk at some point in time, yes.

(Tr. 1712.)

In Doyle, the Supreme Court determined that implicit in a defendant's post-arrest right to silence articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966), is a right not to be penalized for exercising those rights by the prosecutor's attempt to impeach. *Doyle*, 426 U.S. at 618. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), however, the Court determined that to obtain habeas corpus relief for a Doyle violation, the petitioner must demonstrate that the prosecutor's comment "'had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court went on to clarify that while a habeas petitioner is entitled to "plenary review of their constitutional claims, [] they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Id.* (citation and internal quotation marks omitted).

Under the *Brecht* standard, Spisak's claim must fail. During trial, Spisak admitted to three murders and two attempted murders. Thus, any

testimony elicited from him in violation of his post-arrest right to silence must be considered in the context of his other testimony. Consequently, Spisak cannot now claim he was prejudiced by the prosecutor's comments. The Ohio Supreme Court reasonably found this claim to be without merit and, after independent review, this court finds similarly.

2. Twenty-Ninth Ground For Relief

In his twenty-ninth ground for relief, Spisak contends that the jury was misled regarding its responsibility to detenl1ine a sentence as both the prosecutor and trial court indicated that it was only a "recommendation." The court finds this claim is not procedurally defaulted as Spisak raised this issue to the Ohio Supreme Court as Proposition of Law XIV. Therefore, the court will address the merits of the claim.

In this claim, Spisak asserts there were several instances during voir dire, and in the trial Court's mitigation phase instructions to the jury, in which the jurors were told that by the prosecutor their verdict would only be a recommendation to the court. While the court will not repeat each instance here, the court will cite some of this language for purposes of illustration:

> Q: Now, do you understand that what happens in a case such as this if the evidence is there, that's what you would do, you would make a determination whether you should recommend to the Judge that the death sentence be imposed; do you follow me?

A: Okay.

Q: And if you as a juror recommend this sentence, then the Judge can either accept that recommendation or he can reject it, all right?

A: Okay.

***

Q: So if you recommend the death sentence, that does not automatically mean he is going to get the death sentence, it means that Judge Sweeney has to consider it.

(Voir Dire Tr. 293-94.)

The Supreme Court held in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe . . . , that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[25] To establish a *Caldwell* violation, the defendant must show that the trial judge improperly described the jury's role under state law in order to dilute its

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[25] The court notes that the Supreme Court also determined that *Caldwell* announced a "new rule" and thus a habeas petitioner cannot claim relief pursuant to Caldwell if his or her conviction became final prior to *Caldwell*. *Sawyer v. Smith*, 497 U.S. 227 (1990). Spisak's conviction became final in 1989, when the Supreme Court denied certiorari. *Spisak v. Ohio*, 489 U.S. 1071 (1989). Because *Caldwell* was decided in 1985, Spisak is not barred from pursuing this claim.

responsibility. *Mapes v. Coyle*, 171 F.3d 408,415 (6th Cir. 1999) (citing *Kordenbrook v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990)).

Ohio law provides:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the report submitted pursuant to division (D)(l) of this section, the trial jury . . . shall determine whether the aggravating circumstances the offender was foui1d guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [one of two terms of life imprisonment] . . .
>
> If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving

> thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the courts shall proceed to impose sentence pursuant to division (D)(3) of this section.

Ohio Rev. Code § 2929.03 (D)(2). Division (D)(3) requires the trial judge to weigh independently the aggravating circumstances and mitigating factors, and impose the death penalty if the aggravating circumstances outweigh the mitigating factors.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985), the Supreme Court held that, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." In rejecting a similar claim to that brought by Spisak, the Sixth Circuit in *Buell v. Mitchell*, 274 F.3rd 337, 352 (6th Cir. 2001), held that "[i]t is an accurate statement of Ohio law for a trial judge to instruct a jury that their finding that a death sentence is warranted is a recommendation.

It is specifically stated in Ohio Rev. Code § 2929.03(D)(2) that if the jury unanimously finds that aggravating circumstances outweigh mitigating factors 'the trial jury shall recommend to the court that the sentence of death be imposed on the offender.'" Accordingly, Spisak cannot argue that the prosecutor or trial court incorrectly described Ohio law. On direct appeal, the Ohio Supreme Court acted

reasonably when denying this claim. Thus, Spisak's twenty-ninth ground for relief is not well-taken.

3. Thirtieth Ground For Relief

Spisak argues in his thirtieth ground for relief that the trial court improperly excluded potential juror Thomas J. Schmitt during voir dire because he voiced some opposition to the death penalty. The court finds this claim was properly raised to the Ohio Supreme Court as Proposition of Law XV. Thus, the court will address the merits of the claim.

In *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), the Supreme Court invalidated a capital sentence when the trial court excused all jurors who expressed a conscientious objection to the death penalty. The Court reasoned that the proper inquiry was not whether a prospective juror opposed the death penalty generally, but whether the juror's religious, moral or philosophical beliefs would prevent him or her from following the court's instructions. *Id.* at 514 n.7 ("[E]ven a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the laws of the State.").

The Court revisited this issue after lower court confusion about how to apply the *Witherspoon* standard, determining:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would

> prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. 38, 45 (1980); *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (affirming *Adams* standard). Given the subjective nature of any such determination, the Court cautioned that "deference must be paid to the trial judge who sees and hears the juror." *Witt*, 469 U.S. at 426.

During voir dire, the prosecutor questioned Mr. Schmitt regarding his views on capital punishment. After a lengthy discourse, the prosecutor questioned Mr. Schmitt as to whether he could follow the dictates of the law:

> Q: But if you are finiily convinced in your own mind you will fairly consider the imposition of death and will recommend it if it is proper in this case, you will tell us that, too, won't you?
>
> A: Well, I don't think I can ever say that anyone deserves the death penalty no matter what they have done.
>
> Q: So what you are saying if I understand you correctly, and don't let me put words in your mouth - regardless of what the evidence is, it doesn't make any difference. I mean it

> doesn't make any difference what the evidence is, is that what you are saying?
>
> A: Well, in a way.
>
> Q: And you are also saying under no circumstances could you put your religious morals and philosophical beliefs aside and recommend to this Court the defendant be put to death, right?
>
> A: I don't think I can do that.

(Y. D. Tr. 258-59.) Although defense counsel attempted to demonstrate that Mr. Schmitt could, indeed, follow the dictates of the law, the trial court ultimately excused Mr. Schmitt from the case.

Spisak argues that Mr. Schmitt's determination in response to defense counsel's questioning that he could follow the law is proof that he was improperly excused. The court disagrees. While Mr. Schmitt did affirmatively respond that he could follow the law, he also responded ambiguously to defense counsel's questions as to whether he could ever impose the death penalty. Coupled with the responses Mr. Schmitt provided to the prosecutor and the deference with which a habeas court must give to the trial Court, the court finds that Mr. Schmitt was not improperly excused from juror service. The Ohio Supreme Court did not act unreasonably when it denied this claim. Accordingly, Spisak's thirtieth ground for relief is not well-taken.

H. Ground for Relief Relating to Bias and Sympathy

Thirty-First Ground For Relief

In his thirty-first ground for relief, Spisak contends he was denied due process when the trial Court permitted the testimony of three state witnesses: (1) Clem Sharkey; (2) John Hardaway; and, (3) Kathleen Sheehan. The court notes this claim is not procedurally defaulted because Spisak raised it as Propositions of Law XXIV, XXV, and XXVI to the Ohio Supreme Court.

As stated above, a habeas court cannot grant relief solely on the basis of error in the admission of evidence. Review of a state Court's evidentiary ruling on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker*, 27 F.Supp.2d 952,985 (W.D. Ky. 1998) (quoting *Kelly v. Withrow*, F.3d 363,370 (6th Cir. 1994)); *see also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988) (holding "errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding") (citations omitted).

In this claim, Spisak maintains that the introduction of the testimony of Clem Sharkey, John Hardaway, and Kathleen Sheehan was irrelevant and served only to arouse the sympathy of the jurors prejudicing Spisak. While the court finds that some

testimony was superfluous, most was relevant to the proceeding. Clem Sharkey, a friend and distant relative of Horace Rickerson testified that Reverend Rickerson told him he was to be on the Cleveland State University Campus on the day he was shot for purposes of establishing a deaf ministry, rather than to engage in homosexual activity, which Spisak alleged during trial. Additionally, the focal point of John Hardaway's testimony was to recreate the crime scene at which he was shot. Finally, the essence of Kathleen Sheehan's testimony was to establish that Timothy Sheehan left the house the morning he was murdered with his wallet, five credit cards, and fourteen dollars in cash. Any testimony these witnesses provided that was irrelevant to establishing the above facts does not constitute such egregious error so as to deny Spisak the right to a fair trial. The Ohio Supreme Court acted reasonably in denying this claim. Consequently, the court finds Spisak's thirty-first claim is without merit.

I. Ground for Relief Relating to Ineffective Assistance of Counsel

Thirty-Second Ground For Relief

In this ground for relief, Spisak alleges ineffective assistance of counsel throughout the trial court proceeding. The court finds that this claim is not procedurally defaulted, as Spisak raised these claims to the Ohio Supreme Court on direct appeal as Propositions of Law II, XVII, LVII and LIY. Thus, the court will address Spisak's many sub-claims on the merits.

In this claim for relief, Spisak asserts the following sub-claims as instances of trial counsel's ineffectiveness:[26]

Pretrial Investigation and Preparation:

(A) Counsel failed to investigate the facts of the case; including but not limited to, the defense of insanity;

(B) Counsel failed to interview individuals personally acquainted with Petitioner's bizarre and irrational behavior as manifested by Petitioner's actions;

(C) Counsel failed to provide available collateral information to the mental health experts appointed in Petitioner's case and failed to properly interview them;

(D) Counsel failed to develop sufficient expertise or knowledge regarding the psychiatric issues and the defense of insanity;

(E) Counsel failed to collect all available records and background on Petitioner's psychological, social, sexual, and developmental history;

(F) Counsel failed to conduct a thorough pretrial investigation of sentencing phase issues and mitigating factors;

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[26] The court has re-numbered the sub-claims to conveniently refer to them.

(G) Counsel failed to adequately and thoroughly investigate the facts of Petitioner's case in order to arrive at a coherent defense strategy to support the guilt phase defense presentation of insanity while not totally undermining the defense mitigation phase presentation;

Pretrial Motion Practice:

(H) Counsel failed to file a motion for change of venue;

(I) Counsel failed to attack the entry and search of Petitioner's house in which Petitioner was arrested on unrelated misdemeanor charges in which evidence was seized; failed to attack the search of the house in which the Petitioner was arrested and the accompanying search of Petitioner's belongings; failed to attack the search of the car in which the Petitioner was riding immediately prior to his arrest;

(J) Counsel failed to challenge by a Motion in Limine or any other way the prosecution's stacking of multiple aggravating circumstances, specifically the nineteen specifications;

(K) Counsel failed to mount any meaningful attack on Ohio's death penalty statute;

Voir Dire:

(L) Forty-six jurors were passed for cause in the individual portion of voir dire. Trial counsel did not ask questions of thirty-two of these jurors;

(M) Only three jurors who were passed for cause in this individual phase were asked questions by counsel about the death penalty;

(N) Trial counsel failed, with one exception, to question jurors who actually sat to hear the case, about their attitudes on the death penalty in order to fonl1 the basis for the cause challenges against jurors who were so much in favor of the death penalty that they would always vote death in the event of a conviction;

(O) Three jurors from the pool were excluded because of their opposition to the death penalty. Defense counsel did not attempt to rehabilitate any of these jurors pursuant to *Wainwright v. Witt*, 469 U.S. 412 (1985);

(P) Counsel failed, with two exceptions, to question prospective jurors regarding the insanity defense and their attitudes towards psychiatrists and psychologists in order to exercise cause challenges against those who would not vote for or consider not-guilty by reason of insanity as a viable defense or who would never vote in agreement with psychological testimony;

(Q) Counsel failed to question any jurors who sat with respect to what they knew about the case from an avalanche of pervasive and inflammatory pre-trial publicity, in order to build challenges for cause against those jurors who had formed adverse opinions against the Petitioner;

(R) Counsel failed to ask any questions at all to two jurors in either individual or group voir dire;

(S) Counsel failed to object to the numerous admonitions to the jury by the trial court and prosecutor that their death verdict would simply be a "recommendation;"

Trial:

(T) Counsel twice demeaned Petitioner in his opening statement by referring to him as a "demented," "twisted member of society;" (U) Counsel failed to object to the shackling of the Petitioner during jury views and the scenes of the various crimes and failed to request a cautionary instruction be given to the jury regarding the prejudicial effect of the shackling and that no adverse inferences should be drawn therefrom;

(V) Counsel failed to object to the introduction of numerous "other acts" of the Petitioner;

(W) Counsel failed to object to the introduction of autopsy evidence by a doctor who did not perform the autopsy;

(X) Counsel failed to object to improper and prejudicial cross-examination of the Petitioner;

(Y) Counsel failed to adequately prepare an opening statement, but rather presented a rambling discourse on the Petitioner's Nazi beliefs;

Mitigation:

(Z) Trial counsel made repeated references to the brutal circumstances of the killings and the accompanying pain to the families as "aggravated circumstances." As a matter of law, these are not aggravating circumstances;

Other:

(AA) Trial counsel erroneously advised the Petitioner to enter a no contest plea to the attempted murder of John Hardaway;

(Petition at 90-94.)

The court initially notes that many of these sub-claims have been raised as discreet claims elsewhere in the Petition. Because the court found no merit to those underlying claims, the court now finds that Spisak was not prejudiced by counsel's acts or failure to act in conjunction with those claims. Specifically, the court finds that sub-claims (I), (J),

(K), (S), and (V) were raised as distinct grounds for relief in other claims in this Opinion. Thus, those sub-claims are without merit.

Additionally, a number of sub-claims are merely reassertions of Spisak's sixth and tenth grounds for relief. Sub-claims (A), (B), (C), (E), (F), (G), and (Z) were raised previously. The court will not, therefore, readdress them here.

As stated above, the Sixth Amendment dictates that a criminal conviction must arise from "an adversarial process, rather than the ex parte investigation and determination by the prosecutor." *Nix v. Williams*, 467 U.S. 431, 453 (1984). As such, a criminal defendant is entitled to more than mere appointment of counsel. Counsel's performance during a criminal trial must be sufficient to ensure a defendant's trial was fair. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To determine whether a criminal defendant received the meaningful representation the Sixth Amendment mandates, a reviewing court must submit counsel's performance to a two-pronged analysis. *Id.* at 687. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in trial counsel's performance. *United States v.*

Cronic, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. When challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently re-weighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696.

Subjecting Spisak's remaining sub-claims to the above test, the court finds that some sub-claims do not allege specific instances of misconduct or how Spisak was prejudiced by them. Sub-claims (D) and (X) do not adequately articulate a claim. In sub-claim (D), Spisak baldly asserts that trial counsel "failed to develop sufficient expertise or knowledge regarding the psychiatric issues and the defense of insanity" without supporting this allegation by facts. Similarly, in sub-claim (X), Spisak asserts that trial counsel "failed to object to improper prejudicial cross-examination of the Petitioner" without citing instances in which counsel should have objected. Because Spisak has failed to point to specific errors in trial counsel's performance as required under

United States v. Cronic, 466 U.S. 648, 666 (1984), these two sub-claims are without merit.

In sub-claims (O), (T), (U), and (Y), the court rejects Spisak's factual assertions and finds that counsel did not act objectively unreasonable pursuant to *Strickland*. In sub-claim (O), Spisak asserts that trial counsel did not attempt to rehabilitate three jurors who were excused for cause because they stated they could not, under any circumstances, sentence Spisak to the death penalty. One such instance is noted above in Spisak's thirtieth ground for relief in relation to juror Thomas Schmitt. As the court stated above, trial counsel did, in fact, attempt to rehabilitate Juror Schmitt and objected to the trial court's dismissal of this juror. Although trial counsel did not object to the court's excusing two other prospective jurors, both indicated that they would not consider the death penalty under any circumstances although the law might require them to do so. (V.D. Tr. 578-79, 604.) As stated in claim thirty above, a juror may be excused for cause if he or she cannot put aside his or her moral, religious, or philosophical beliefs and follow the dictates of the law. *Wainwright v. Witt*, 469 U.S. 412,424 (1985). Because sub-claim (O) is partially factually incorrect and partially contradicted by law, the court finds it has no merit.

In sub-claims (T) and (Y), Spisak asserts that counsel demeaned him by referring to him during opening statements as "demented" and "twisted" and that counsel did not adequately prepare for opening statements. The court disagrees. While trial counsel did call Spisak demented and twisted in two

instances during the opening statement, counsel did not demean Spisak by the use of such language but, instead, was attempting to demonstrate that Spisak was an insane individual whose views would ultimately offend the jury when he testified. Rather than presenting a "rambling discourse," as Spisak suggests, defense counsel told the jury that what they would hear from Spisak would offend them, but that "in spite of being shocked that they can say . . . I'm a juror and I'm going to be fair" (Tr. 152). Because trial counsel provided Spisak with a constitutionally sufficient opening argument, sub-claims (T) and (Y) are not well-taken.

Furthermore, Spisak fails to fully enlighten the court with all facts surrounding sub-claim (U). In that sub-claim, Spisak contends that trial counsel failed to object to the shackling of Spisak while on a jury view and failed to request an instruction that no adverse inferences be drawn from Spisak's shackling. Although the presumption of innocence prevents a trial court from compelling a defendant to wear identifiable prison clothes during trial, *Estelle v. Williams*, 425 U.S. 501 (1976), Spisak's trial court did not require him to do so. Before trial, the jury went on a jury view of the Cleveland State University and other murder scenes. Spisak expressed his desire through counsel to be present during this trip. Although the trial court noted that Spisak would have to be shackled on this journey for security purposes, counsel stated that he had informed Spisak the possible prejudice he could face of by the jury seeing him in shackles and handcuffs but that Spisak pointedly *waived this right*. This waiver is noted on the record:

> The Court: Apparently Mr. Spisak wishes to visit the scene. The security requirements of the Sheriffs Department is that he be shackled and handcuffed, which is difficult to do sometimes because the jury might see this. The jury is going there, and Mr. Spisak is going there too, and there is the possibility the jury could in fact see him shackled. I am sure they are aware that he is incarcerated. What do you have to say?
>
> Mr. Shaughnessy: As to the defendant, Frank Spisak, expressed a wish to go on the jury view to be a part of any and all proceedings of which he has that right.
>
> There is no question he is in jail. I have explained to him that there could be some detrimental effects, I don't know what they will be factually, but being viewed in the shackles and handcuffs we specifically waive those. Everybody knows he's in jail. Everybody know he's going to be in shackles, and there is no problem here.
>
> We are not going to come back and complain if it does happen. If it comes to our attention somebody saw him, we are not going to object to that. I have specifically explained that to my client.

(Tr. 104-05.) Thus, Spisak specifically waived his right to assert any prejudice from the jury viewing him in shackles. More importantly, Spisak does not

now contend that the jury actually did see Spisak while on the jury view. The court cannot presume prejudice without any factual support. Thus, sub-claim (U) is not well-taken.

In sub-claim (H), Spisak argues trial counsel was inadequate because counsel failed to file a change of venue motion. Spisak alleges, without support, that even though prospective juror Zayac "revealed there was gossiping about the case. . . [n]either trial counsel nor the court did anything to alleviate this problem." Petition at 91.

The Supreme Court determined in *Irvin v. Dowd*, 366 U.S. 717 (1961), that finding a jury totally ignorant of a case is difficult. In that case, the Court determined that:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in a criminal case. To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption or a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a

> verdict based on the evidence presented in court.

Id. at 722-23.

Following this precedent, the Sixth Circuit has held that it is sufficient if a juror who has formed an impression as to guilt or innocence from pre-trial publicity can put aside that impression and render a verdict based solely on the evidence. *Kelly v. Winthrow*, 25 F.3d 363, 368 (6th Cir. 1994), *cert. denied*, 513 U.S. 1061 (1994). Consequently, a petitioner must point to actual prejudice to succeed on a change of venue claim.

The court finds that this sub-claim fails as Spisak cannot demonstrate that counsel's actions were objectively unreasonable nor can he establish the prejudice requisite to obtain relief. While Spisak notes that there was some "general gossiping" about the case, he does not delineate any instances in which a juror stated he or she could not render a verdict based on the evidence proffered at trial. As such, sub-claim (H) is without merit.

In sub-claims (L), (M), (N), (P), (Q), and (R), Spisak asserts that counsel failed, on numerous occasions during voir dire, to question jurors regarding their views of particular topics, or to pose any questions to particular jurors. Once again, Spisak does not allege that counsel's failure to question jurors as to these specific issues resulted in prejudice. Spisak fails to make the critical nexus between the alleged unreasonable behavior, and the resulting prejudice to him. For example, although counsel may not have questioned some jurors regarding what information they learned from this

case through the media, there is no indication that counsel did not obtain sufficient information through the court's or prosecution's questioning. Thus, it is impossible to determine, based on Spisak's bare assertion, whether counsel's failure to question was unreasonable or whether Spisak was prejudiced thereby. Thus, Spisak has not articulated a claim for ineffective assistance of counsel pursuant to Strickland for these sub-claims. Accordingly, the court finds they are without merit.

Spisak's sub-claim (V) suffers from a similar defect. In that sub-claim, Spisak contends that trial counsel were ineffective for failing to object to the introduction of autopsy evidence by a physician who did not perform the autopsy. Spisak fails to supply the court with basic information about this claim, such as which doctor and what specific testimony is objectionable. Without providing the court with more specific information about the background of this sub-claim and the reasons for counsel's alleged ineffectiveness, i.e., counsel's unreasonable behavior and the resulting prejudice to Spisak, the court cannot find merit in this sub-claim.

Finally, Spisak alleges counsel erroneously advised him to enter a no contest plea to the attempted murder of John Hardaway. The court finds this claim fails under *Strickland*. Given the fact that Spisak previously told police about the details of each murder and attempted murder, and the fact that Mr. Hardaway was able to identify Spisak in a police lineup, counsel's advice was not objectively unreasonable. Consequently, the court finds sub-claim (AA) is without merit.

Because the court finds that none of Spisak's sub-claims possess merit, it consequently finds that the Ohio Supreme Court was not unreasonable in denying these claims on direct appeal. Accordingly, Spisak's thirty-second ground for relief is not well-taken.

J. Ground for Relief Relating to the Constitutionality of Ohio's Death Penalty

Thirty-Third Ground For Relief

Spisak argues in his thirty-third ground for relief that the Ohio death penalty is unconstitutional both facially and as applied. In raising this issue, Spisak has asserted that the Ohio death penalty scheme violates due process in thirteen separate sub-claims. Some of these claims are procedurally defaulted as they were not raised to the Ohio Supreme Court.[27] Other claims, however, were raised

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[27] Furthermore, Spisak does not allege cause or prejudice to excuse this procedural default. To be thorough, however, the court will address the merits of these defaulted sub-claims in summary fashion. These sub-claims assert the unconstitutionality of the Ohio death penalty statutes because:

(1) it is arbitrary as it allows for prosecutorial discretion in choosing which cases to seek a capital indictment. The United States Supreme Court rejected this argument under a similar death penalty statute and sanctioned the discretionary system. *Gregg v. Georgia*, 428 U.S. 153 (1976);

(2) it imposes a risk of death on those capital defendants who choose to exercise their right to trial. In *United States v. Jackson*, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to trial. In that case, the court struck down the capital portions of a federal kidnapping

to the Ohio Supreme Court as the LXII (62nd) and LXIV (64th) Propositions of Law. The court will address these claims individually.

Spisak first claims that the Ohio death penalty scheme violates the due process clause because one of the aggravating factors for capital felony murder merely repeats an element of the crime.[28] The Ohio death penalty comports with

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statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after trial." *State v. Buell*, 489 N.E.2d 795 (Ohio 1986). Consequently, the Ohio scheme comports with the constitutional mandate;

(3) it provides for a bifurcated system with the same jury serving at both phases of trial. Spisak points to no authority that would hold this provision of the Ohio death penalty constitutionally infirm. Furthermore, the bifurcated system long has been upheld as a system that has the desired effect of narrowing the class of death-eligible defendants. *Lockett v. Ohio*, 438 U.S. 586 (1978);

(4) the jury is instructed not to consider mercy or sympathy for the defendant in its decision. The Supreme Court held that a charge instructing the jury to not be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was constitutionally sound as a reasonable juror would understand that this instruction was meant to limit the jury to weigh only the evidence before it. *California v. Brown*, 479 U.S. 538, 540 (1987).

[28] Spisak contends that one of the statutory aggravating circumstances, Ohio Rev. Code § 2929.04(A)(7), duplicates the statutory definition of felony murder, Ohio Rev. Code § 2903.01(B). This duplication, Spisak argues, demonstrates the failure of the Ohio statutory scheme to narrow the class of death-eligible defendants.

Supreme Court jurisprudence that requires a statutory scheme to limit the class of death-eligible defendants. Moreover, this "double counting" system was upheld in *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1987). *See also State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984) (noting that under Ohio Rev. Code § 2929.04(A)(7) a state must not only prove that the defendant caused the death of another to establish the aggravating circumstance, but it also must prove that the defendant was the principal offender in the commission of the aggravated murder, or that the aggravated murder was committed with prior calculation and design.). This additional factor complies with the narrowing prerequisites set forth in *Lowenfield*.

Spisak also asserts that the Ohio scheme is unconstitutional because the aggravating circumstances are introduced during the guilt phase rather than the mitigation phase of trial. Under this system, Spisak argues, the jury cannot make an individualized death penalty determination. The United States Supreme Court specifically upheld this type of system in *Walton v. Arizona*, 497 U.S. 639 (1990).[29]

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[29] This aspect of the *Walton* holding is unaltered by the recent Supreme Court decision *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). In that case, the Court partially overruled *Walton* because it found Walton irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case in which the Court held that the Sixth Amendment does not permit a judge to impose a sentence that would exceed the maximum sentence to which the defendant would be exposed if punished pursuant to the facts found by the jury. Thus, because *Walton* found Arizona's capital sentencing constitutional even though it permitted a judge

Spisak next asserts the unconstitutionality of the Ohio death penalty because there is no specified standard of proof for finding mitigating factors. This argument is without merit, however, because there is no constitutional requirement that a death penalty scheme contain a particular standard of proof for the consideration of mitigating factors. *Walton*, 497 U.S. at 650; *Skaggs v. Parker*, 27 F.Supp.2d 952, 996-99 (W.D. Ky. 1998). Spisak also argues that the Ohio death penalty scheme violates due process because it fails to provide the sentencing authority with an option to impose a life sentence when it finds only aggravating circumstances exist. This argument also is without merit, however, as the Supreme Court rejected the identical argument in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

Spisak further takes issue with the burden of proof and production required in a capital conviction, alleging it unconstitutional to both require a defendant to establish a mitigating factor by a preponderance of evidence and, conversely, not require the state to prove the absence of mitigating factors. As stated above, the Supreme Court rejected

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alone to find aggravating factors and impose a death sentence, the *Ring* Court overruled it. The Court limited its holding, however, overruling *Walton* only "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 122 S.Ct. at 2430. Consequently, the portion of *Walton* finding it permissible for the prosecution to present both the initial opening argument and last closing argument remains intact.

the identical arguments in *Walton v. Arizona*, 497 U.S. at 649-50.[30] Thus, both arguments must fail.

Spisak next contends that the Ohio death penalty statutes are unconstitutional because they fail to require a finding that death is the only appropriate remedy before imposing a capital sentence. Additionally, Spisak asserts the Ohio scheme is constitutionally infirm because it does not provide an adequate proportionality review as it compares a death-sentenced defendant with others who received capital punishment, rather than a comparison with life-sentenced individuals. Spisak's claim regarding an appropriate sentence must fail because no such constitutional mandate exists. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal. Finally, the Supreme Court has determined that a comparative proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37 (1984). Moreover, the Sixth Circuit held in a recent opinion that, because "proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001).

Spisak also argues that the death penalty is not the least restrictive means of effectuating deterrence. The Supreme Court addressed this exact point in Gregg v. Georgia, 428 U.S. 153 (1976). Noting that imposing criminal punishment is a legislative responsibility, the Court limited its own

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[30] This portion of Walton also remains unaltered by the Ring holding.

ability to "require the legislature to select the least severe penalty possible." *Id.* at 175.

Finally, Spisak contends that the death penalty in Ohio is imposed in a racially discriminatory manner, alleging those who are racial minorities or who kill whites are more likely to receive the death penalty. Pursuant to *McClesky v. Kemp*, 481 U.S. 279 (1987), a capital defendant cannot evade a death sentence merely by demonstrating the statistical disparity of capital defendants or victims of a particular race. Instead, the capital defendant must prove that the decision maker in his or her individual case acted with a discriminatory purpose, and that such actions had a discriminatory effect on the proceeding. *Id.* at 292. As Spisak has not asserted discrimination occurred during his sentencing, this claim must fail.

Because the court finds that none of Spisak's sub-claims are meritorious, it concludes that the Ohio Supreme Court did not act unreasonably pursuant to 28 U.S.C. § 2254(d). Accordingly, Spisak's thirty-third ground for relief is not well-taken.

VII. CONCLUSION

Recently, the Sixth Circuit found that a district court need not wait until a petitioner moves for a Certificate of Appealability (hereinafter "COA") before issuing a COA for claims raised in the petition. *Castro v. United States*, 310 F.3d 900 (6th Cir. 2002). There, the court reasoned that, because a district court that has recently denied a writ of habeas corpus will have "an intimate knowledge of both the record and the relevant law and could

simply determine whether to issue the certificate of appealability when [it] denies the initial petition," it stands to reason that the proper time to determine whether to grant a COA is at the conclusion of the opinion granting or denying the writ. *Id.* at 901 (internal quotation marks and citations omitted).

Furthermore, in two other recent decisions, the Sixth Circuit determined that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, it is now appropriate to determine whether to grant a COA as to any of the claims the petitioner presented in his petition pursuant to 28 U.S.C. § 2253.

That statute states in relevant part:

> (c)(l) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court

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> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDP A statutes is that the petitioner now must demonstrate he was denied a *constitutional* right, rather than the federal right that was required prior to the AEDP A's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre- and post-AEDPA versions of the statute in *Slack v. McDaniel*, 529 U.S. 473 (2000). In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. Thus, the Court determined that:

> "[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues

> presented were "'adequate to deserve encouragement to proceed further.'"

Id. at 483-4 (quoting *Barefoot*, 463 U.S. at 893 n.4).

The Court went on to distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim is not procedurally defaulted, then a habeas court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (emphasis supplied).

After taking the above standard into consideration, the court certifies all or part of thirteen (13) of Spisak's thirty-three (33) claims. The court's reasoning is set forth below.

Initially, the court certifies claims one and two for appeal (exclusion of Dr. Markey's testimony during trial). While the court found that the trial court properly excluded this testimony based on Dr. Markey's responses, a reasonable jurist could conclude to the contrary. Dr. Markey's response to the prosecutor's questions were, sometimes, ambiguous, such as when he stated that Spisak could "at times control [his impulse to kill, but] at other

times he would decide that he didn't need to control it." (Tr. 1992.) While it appears that Dr. Markey is stating that Spisak was able to control his own conduct, a fact that would prevent him from successfully asserting an insanity defense under Ohio law, a jurist of reason might conclude that, based on the ambivalence apparent in portions of Dr. Markey's testimony, the trial court should have permitted the jury to determine its weight and credibility. Because the court finds claims one and two merit a COA, it necessarily finds that claim four, the trial court's failure to instruct on insanity, should also be certified for appeal.

The court will not issue a COA for Spisak's third claim for relief (trial court restricted his right to testify about his religious beliefs). The court finds, as it did in its Opinion, that a review of the trial transcript reveals that the trial court did not place unreasonable limits on Spisak's testimony concerning his religious beliefs. Because no reasonable jurist would debate the court's factual conclusion based on the record, the court will not issue a COA for this claim.

The court will grant a COA, however, for Spisak's fifth claim for relief (trial court's failure to merge aggravating circumstances specifications). While the court concluded that, pursuant to United States Supreme Court precedent, the trial court's duplication of aggravating circumstances in its charge to the jury was harmless error, a jurist of reason might conclude that the misleadingly expansive list of aggravating factors influenced the

jury's decision to impose death. Thus, the court will issue a COA for this claim.

Claims six, ten, thirteen, fifteen, sixteen, eighteen, nineteen, and thirty-two all allege ineffective assistance of counsel. The court finds that some merit a COA, while others do not. The court issues a COA for claim six (ineffective assistance of counsel during closing argument in mitigation). Although the court found that this case was factually distinguishable from *Rickman v. Bell*, 131 F .3d 1150 (6th Cir. 1997), a reasonable jurist might find that defense counsel's use of disparaging and, at times, demeaning comments about Spisak were objectively unreasonable and prejudicial. Claim ten also alleges ineffective assistance during various aspects of the mitigation phase of trial. The court finds, as it did in the Opinion, that sub-claims (1), (2), (4), (5), and (6) are procedurally defaulted under *State v. Perry*, 226 N.E.2d 104 (Ohio 1967). As no reasonable jurist would debate the defaulted status of those sub-claims, the court wm not issue a COA for them. The court will issue a COA for the remaining sub-claims, however. Although the court found no indicia of defense counsel's unpreparedness, a jurist of reason might find otherwise. Thus, the court issues a COA for sub-claims (3), (7), and (8) of Spisak's tenth claim for relief. The court does not issue a COA for sub-claim (9) (failure to object to prosecutorial misconduct during mitigation) because the court finds that no reasonable jurist would find that the prosecution's cross-examination of Dr. McPherson was an attempt to introduce a non-statutory aggravating factor.

The court will not issue a COA for claim thirteen (ineffective assistance of appellate counsel). As the court stated in its Opinion, Spisak cannot satisfy the prejudice prong of the *Strickland* analysis when he alleges ineffective assistance for initial appellate counsel's decision to bring only one claim on appeal. Because the Ohio Supreme Court heard sixty-four (64) claims when Spisak appealed the Eighth District's decision, Spisak cannot demonstrate that initial appellate counsel's failures prejudiced the outcome of his direct appeal. The court will not, moreover, issue a COA as to claims fifteen and sixteen (the Eighth District Court of Appeals caused ineffective assistance of counsel when it refused to hear subsequent appellate counsel's supplemental arguments). Given the fact that Spisak had obtained representation during his initial appeal to that court, the court finds the Court of Appeals may not be held accountable for initial counsel's failure to raise additional claims or its decision to adhere to its procedural rules. The court also finds that Spisak's eighteenth and nineteenth grounds for relief (ineffective assistance of counsel for failure to move to exclude evidence obtained in Ronald Reddish's apartment) do not merit a COA. Because Spisak admitted to the murders during his trial testimony, he is hard pressed to demonstrate that counsel's failure to object to the introduction of this evidence prejudiced him. For similar reasons, and because a habeas court cannot typically recognize Fourth Amendment search and seizure claims, the court also denies a COA for Spisak's seventeenth ground for relief.

Spisak's final ineffective assistance of counsel claim, claim thirty-two, alleges that counsel were ineffective on numerous occasions during trial. The court grants a COA as to some, but not all, of these sub-claims. First, the court will not grant a COA as to sub-claims (A), (B), (C), (E), (F), (G), and (Z) because they are merely duplicative of Spisak's sixth and tenth grounds for relief. The court also denies a COA for claims (D), (L), (M), (N), (P), (Q), (R), (V), (X), and (W) because, as stated in the Opinion, the court finds these claims neither set forth specifically how counsel was objectively unreasonable nor how this conduct prejudiced the proceedings. The court will not grant a COA as to sub-claims (I), (K), (O), and (S) for the reasons set forth in the underlying claims for relief that were the impetus for Spisak's ineffective assistance of counsel claim.

Of the remaining sub-claims, the court finds that jurists of reason would debate the court's decision and, thus, that they merit a COA. First, in sub-claim (H), Spisak argues that trial counsel were ineffective for failing to move for a change of venue. While the court determined that Spisak provided no indicia of media influence on the jury, a jurist of reason might conclude that, due to the extensive publicity the case engendered, trial counsel should have moved to change venue. In sub-claim (J), Spisak asserts that the prosecution's stacking of nineteen specifications swayed the jury against him. For the reasons stated in the court's decision to grant a COA as to Spisak's fifth claim for relief, the court also grants a COA as to sub-claim (J). In sub-claims (T) and (Y), Spisak asserts that counsel was ineffective for calling him "demented" and "twisted"

in opening arguments. For the reasons set forth in the COA analysis relating to the sixth ground for relief, the court grants a COA for sub-claims (T) and (Y).

Alternatively, the court finds that sub-claims (U) and (AA) do not merit a COA. In sub-claim (U), the court finds that jurists of reason would not debate, as stated in the Opinion, that Spisak specifically waived his right to be seen by the jury in shackles. Thus, Spisak cannot now demonstrate the counsel's failure to object to his shackling was objectively unreasonable or prejudiced him. Finally, the court will not grant a COA as to sub-claim (AA), that counsel advised Spisak to plead no contest to the attempted murder of John Hardaway, because Hardaway was able to identify him as the perpetrator.

The court grants a COA as to Spisak's seventh claim for relief. While the court believes that *Jones v. United States*, 527 U.S. 373 (1999), is dispositive of the issue before it, a jurist of reason might read Spisak's seventh claim more expansively. Because such a reading might fall under the purview of *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), the court will grant a COA on this issue.

The court will not grant a COA, however, on numerous claims which occur almost pro forma in a capital habeas petition but are routinely denied. Accordingly, the court will not grant a COA as to claims eight (trial court improperly admonished the jury not to consider sympathy or prejudice), fourteen (failure to maintain a complete record), twenty-seven (admission of gruesome photographs), twenty-nine

(trial court instructed the jury that its verdict was only a "recommendation"), and thirty-three (Ohio death penalty unconstitutional).

The court also will not grant a COA as to Spisak's ninth ground for relief (trial court improperly instructed on aggravating factors) because, as stated in the Opinion, when the instruction is read in context, no reasonable jurist would conclude that the jury would find that it could consider non-statutory aggravating factors.

Spisak's eleventh, twelfth, twenty-third, twenty-forth, twenty-fifth, and twenty-eighth grounds for relief all allege prosecutorial misconduct. The court will issue a COA as to Spisak's eleventh claim (introduction of Murphy testimony) because, although it found that any error resulting from Murphy's testimony was hanl1less, a reasonable jurist may not so find. The court also finds claim twelve and twenty-three (prosecutorial comments) merits a COA because, although it did not find that various comments the prosecutor made had a cumulative adverse effect on the trial, a reasonable jurist could conclude otherwise.

Alternatively, the court finds that claims twenty- four (prosecutor provided unsworn testimony), twenty-five (prosecutor "testified" during trial), and twenty-eight (prosecutor commented on petitioner's post-arrest silence) are not debatable among reasonable jurists because the court finds them to be factually inaccurate after a review of the record. Accordingly, it will not issue a COA for them.

The court will issue a COA for claim twenty-six (trial court improperly admitted excluded

evidence). While the court finds this error to be harmless, a jurist of reason might conclude that the inclusion of this evidence somehow influenced the jury. Additionally, the court will issue a COA for claim thirty-one (trial court improperly admitted testimony of Clem Sharkey, John Hardaway, and Kathleen Sheehan). While the court found in its Opinion that much of their testimony was relevant to proving the state's case, a reasonable jurist could find that it had a prejudicial effect on the jury. Finally, the court denies a COA as to claims twenty and twenty one (trial court erred when it admitted numerous items unrelated to the crime), twenty-two (trial court erred when it admitted testimony regarding various uncharged acts of violence) because this evidence was relevant to proving the state's case. The court also denies a COA as to Spisak's thirtieth claim for relief (trial court erred in excluding prospective juror Schmitt from the jury) because Schmitt unequivocally indicated he could not vote for the death penalty under any circumstances. Thus, no jurist of reason would find that the trial court properly excluded him from the venire.

For the reasons stated in this opinion, this court finds that none of the claims asserted in Spisak's Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254 are well-taken. Accordingly, Spisak's request for habeas corpus relief is denied and his Petition is hereby dismissed.

The court hereby issues a certificate of appealability pursuant to 28 U.S.C. §2253(c) as set forth in the above certificate of appealability analysis.

IT IS SO ORDERED.

/s/SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

April 18, 2003

APPENDIX H

LEXSEE 521 NE2D 800

THE STATE OF OHIO, APPELLEE,

v.

SPISAK, APPELLANT

No. 86-1099

Supreme Court of Ohio

36 Ohio St. 3d 80; 521 N.E.2d 800; 1988 Ohio LEXIS 85

April 13, 1988, Decided

PRIOR HISTORY: [***1]

APPEAL from the Court of Appeals for Cuyahoga County.

On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.

On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting,

and was later able to identify his assailant as the appellant, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.

At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered the appellant, holding a gun, who ordered her back into the stall. Instead, Dartt shoved appellant out of the way and ran down the hallway. Appellant shot at her, but missed. A pellet was later [***2] removed from a wall in the hallway. Dartt identified the appellant as her assailant.

On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing shots from a window at 1367 East 53rd Street. The police were directed to appellant's apartment and appellant, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic

pistol were observed in the room. Appellant made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a [***3] two-shot derringer under the couch cushions. Appellant was arrested for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Appellant was later arrested, hiding in the basement of a friend's house. During a brief search of appellant's suitcase at the scene, police discovered the beeper paper belonging to Sheehan.

Appellant later admitted to shooting Rickerson for allegedly making a homosexual advance toward him; to killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and, finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder [***4] weapon.

Appellant was brought to trial under an eight-count indictment containing twenty specifications, including the aggravated murders of Rickerson, Sheehan and Warford and appurtenant death specifications. Appellant pleaded not guilty and not

guilty by reason of insanity, claiming to be a follower of Adolf Hitler. He was found to have been competent, however, at the time of the acts, and the jury returned guilty verdicts on all counts and specifications, except the alleged aggravated robbery of Warford.

Following the mitigation hearing, the jury recommended that the sentence of death be imposed. In a separate opinion, the trial court concurred, imposing the death sentence. Appellant was also sentenced to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

The court of appeals modified the judgment of the trial court, holding that appellant should have been convicted of only one of the two counts of the aggravated murder of Timothy Sheehan and affirmed as modified. On March 6, 1985, this court remanded the cause to the court of appeals for supplementation of the record with certain hearing requests. The court of appeals [***5] considered the supplemented documents and re-affirmed its earlier decision. The cause was remanded a second time by this court with instructions to consider the additional arguments raised by the State Public Defender's Office, which had been appointed to represent the appellant while the first appeal was pending. The court of appeals considered those arguments and again affirmed the judgment of the trial court, finding the sentence of death to be appropriate in the case.

The cause is now before this court upon an appeal as of right.

DISPOSITION:

Judgment affirmed.

COUNSEL:

John T. Corrigan, prosecuting attorney, and Patricia A. Cleary, for appellee.

Randall M. Dana, public defender, David C. Stebbins, Randall L. Porter, Richard J. Vickers and Kathleen A. McGarry, for appellant.

JUDGES:

MOYER, C.J., SWEENEY, WHITESIDE, HOLMES and H. BROWN, JJ., concur. DOUGLAS and WRIGHT, JJ., concur in judgment only. WHITESIDE, J., of the Tenth Appellate District, sitting for LOCHER, J.

PER CURIAM

OPINION:

[*82] [**801] Pursuant to R.C. 2929.05(A), this court is required to review all cases in which the sentence of death has been imposed in the same manner in which we [***6] review other criminal cases and, in addition, to independently weigh the aggravating circumstances against the mitigating factors adduced at trial, and determine whether the sentence of death is appropriate in the case at bar. *State v. Maurer* (1984), 15 Ohio St. 3d 239, 15 OBR 379, 473 N.E. 2d 768. However, we are not required to consume limited judicial resources writing opinions which [**802] analyze time-worn legal arguments raised in a multiplicity of printed pages. n1 *State v. Poindexter* (1988), 36 Ohio St. 3d 1, 520

N.E. 2d 568. With these parameters in mind, we have reviewed each of appellant's sixty-four propositions of law and find them to be without merit. We affirm the judgment of the court of appeals and uphold appellant's sentence of death.

n1 Appellant's merit brief, reply brief and attached appendix filed in this court comprise over nine hundred pages, all of which supplement a substantial, but average-sized, record of the proceedings in the lower courts. Although we do not presume to impose an arbitrary page limit on briefs in appeals from a sentence of death, we encourage the submission of concise, at least colorable, legal arguments, and conservative duplication of a record which we intend to exhaustively review on our own.

[***7]

In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E. 2d 264, *certiorari denied* (1985), 472 U.S. 1032; *Maurer, supra; State v. Buell* (1986), 22 Ohio St. 3d 124, 22 OBR 203, 489 N.E. 2d 795, *certiorari denied* (1986), 479 U.S. , 93 L. Ed. 2d 165; *State v. Williams* (1986), 23 Ohio St. 3d 16, 23 OBR 13, 490 N.E. 2d 906, *certiorari denied* (1987), 480 U.S. , 94 L. Ed. 2d 699; and *State v. Steffen* (1987), 31 Ohio St. 3d 111, 31 OBR 273, 509 N.E. 2d 383.

In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one,

twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer, supra; Donnelly v. DeChristoforo* (1974), [***8] 416 8 U.S. 637; *Darden v. Wainwright* (1986), 477 U.S. 168; *Strickland v. Washington* (1984), 466 U.S. 668; *Evitts v. Lucey* (1985), 469 U.S. 387; *State v. Smith* (1985), 17 Ohio St. 3d 98, 17 OBR 219, 477 N.E. 2d 1128; *State v. Lytle* (1976), 48 Ohio St. 2d 391, 2 O.O. 3d 495, 358 N.E. 2d 623; *State v. Staten* (1969), 18 Ohio St. 2d 13, [*83] 47 O.O. 2d 82, 247 N.E. 2d 293; *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St. 3d 141, 23 OBR 295, 491 N.E. 2d 1129 (distinguished); *Payton v. New York* (1980), 445 U.S. 573 (distinguished); *Rawlings v. Kentucky* (1980), 448 U.S. 98; *State v. Rogers* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52, paragraph one of the syllabus (Rogers II), *reversed on other grounds* (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581; *Buell, supra; Wainwright v. Witt* (1985), 469 U.S. 412; *State v. Rogers* (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E. 2d 984, paragraph three of the syllabus (Rogers I), *reversed on other grounds* (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581; *State v. Williams* (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E. [***9] 2d 1323; *State v. Williams* (1986), *supra; State v. Byrd* (1987), 32 Ohio St. 3d 79, 512 N.E. 2d 611; *State v. Kidder* (1987), 32 Ohio St. 3d 279, 513 N.E. 2d 311; *Illinois v. Allen* (1970), 397 U.S. 337; *State v. White* (1968), 15 Ohio St. 2d 146, 44 O.O. 2d 132, 239 N.E.

2d 65, paragraph two of the syllabus (distinguished); Evid R. 404(B); *State v. Spikes* (1981), 67 Ohio St. 2d 405, 21 O.O. 3d 254, 423 N.E. 2d 1123; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 24 O.O. 3d 316, 436 N.E. 2d 1001; *State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E. 2d 267; *Maurer, supra,* paragraph seven of the syllabus; *State v. Graven* (1977), 52 Ohio St. 2d 112, 6 O.O. 3d 334, 369 N.E. 2d 1205; *State v. Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State v. Thompson* (1981), 66 Ohio St. 2d 496, 20 O.O. 3d 411, 422 N.E. 2d 855 (distinguished); *State v. Mann* (1985), 19 Ohio St. 3d 34, 19 OBR 28, 482 N.E. 2d 592; *State v. Ferguson* (1983), 5 Ohio St. 3d 160, 5 OBR 380, 450 N.E. 2d 265; *Estelle v. Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d [***10] [**803] 359; *Steffen, supra;* R.C. 2945.39(D); *Doyle v. Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright v. Greenfield* (1986), 474 U.S. 284 (distinguished); *State v. Fanning* (1982), 1 Ohio St. 3d 19, 1 OBR 57, 437 N.E. 2d 583; *Carter v. Kentucky* (1980), 450 U.S. 288 (distinguished); *State v. Price* (1979), 60 Ohio St. 2d 136, 14 O.O. 3d 379, 398 N.E. 2d 772, paragraph four of the syllabus; *State v. DeMarco* (1987), 31 Ohio St. 3d 191, 31 OBR 390, 509 N.E. 2d 1257 (distinguished); *Chapman v. California* (1967), 386 U.S. 18.

Finally, in propositions of law nine, sixteen, twenty, twenty-three, thirty-seven, forty-two, forty-eight and fifty, appellant raises arguments which we find to be wholly without support in the record. In addition, appellant neither timely objected to nor raised below the errors alleged in propositions of law twenty-one, twenty-two, twenty-nine, thirty, thirty-

nine, fifty-one, fifty-two and fifty-three, and has thus waived them: *State v. Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, vacated in part on other grounds (1978), 438 U.S. 911; *Schade, supra; Fanning,* [***11] *supra; State v. Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55. Our review of the record in each instance has failed to establish the presence of plain error. State v. Long (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 78, 372 N.E. 2d 804, paragraph three of the syllabus; *Scott, supra,* at 103, 26 OBR at 88-89, 497 N.E. 2d at 64.

In summary, we find no merit in the propositions of law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme. Proceeding to our independent weighing of the aggravating circumstances and mitigating factors presented herein, we note that appellant's three aggravated murder convictions specify fifteen separate aggravating circumstances [*84] under R.C. 2929.04. However, as pointed out by appellant in his first proposition of law, for purposes of sentencing the doctrine of merger applies herein. *State v. Jenkins, supra,* paragraph five of the syllabus. Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. [***12] 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct.

Although the court of appeals did not apply the merger doctrine below, we have determined that the jury's consideration of the duplicative aggravating circumstances during sentencing did not affect their verdict. *Jenkins, supra.* Furthermore, we have independently determined that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Of the mitigating factors specified in R.C. 2929.04(B) appellant relied solely on his allegation that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3). Although there was testimony that appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, [***13] established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.

Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate [**804] murders tempers the gravity of the offenses. We concur with

the jury and lower courts that the balance of these factors lies heavily, and beyond reasonable doubt, on the side of the aggravating circumstances of which the appellant was convicted.

Finally, considering all our prior decisions affirming a sentence of death, appellant's sentence was not arbitrarily, freakishly or capriciously applied, and is not disproportionate to such prior sentences. Although the majority of such decisions involved a single victim, in *State v. Brooks* [***14] (1986), 25 Ohio St. 3d 144, 25 OBR 190, 495 N.E. 2d 407, we affirmed a death sentence involving the murder of defendant's three sons. In the case sub judice, the sentence of death was properly imposed upon appellant.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment Affirmed.

CONCUR:

DOUGLAS, J., concurring. I write separately for the sole purpose of expressing my view that the doctrine of waiver is not applicable to cases where the penalty of death has been imposed.

APPENDIX I

TRIAL TRANSCRIPT OF JURY SENTENCING INSTRUCTION

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.

On behalf of the Defendant.

Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

Volume 8 of 10

[2959]

CHARGE OF THE COURT

SWEENEY, J.:

Members of the jury, you have heard the evidence and the arguments of counsel. It is now my duty to instruct you on the law which applies in this case. The Court and jury have separate functions. You decide the disputed facts and the Court provides you with the instructions of law.

It is your sworn duty to accept these instructions and to apply the law as it is now given to you by me. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

Now, at the trial of this case, which was concluded Friday, July 5, 19 83, you heard the evidence, testimony and the arguments of counsel as to the aggravating circumstances relating to four separate counts of aggravated murder.

Now, in this sentencing hearing, you heard additional evidence, testimony and the arguments of counsel concerning factors in mitigation and also concerning the aggravating [2960] circumstances

which the defendant, Frank G. Spisak, Jr. was found guilty of committing.

Now, evidence, what is evidence? Evidence is all the testimony received from witnesses during the course of trial -- during the course of this hearing and the exhibits admitted into evidence by the Court.

Now, evidence may be direct, circumstantial, or both.

Direct evidence. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. And it also includes the exhibits received into evidence during the course of the trial by the Court.

Now, circumstantial evidence. Evidence may also be used to prove a fact by inference. This is what is referred to as circumstantial evidence. Circumstantial evidence is the proof of facts by direct evidence from which you may infer other reasonable facts or conclusions.

Now, in the absence of direct evidence, circumstantial evidence by itself will justify a finding of guilty -- strike that.

[2961] Now, where the evidence is both direct and circumstantial -- approach the Bench a second.

(Thereupon, the following proceedings were had at sidebar on the record out of the hearing of the jury:)

THE COURT: They made no objection, and I will continue to read the same charge of circumstantial evidence.

(Thereupon, the following proceedings were had in open court:)

THE COURT: Circumstantial evidence. Evidence may also be used to prove a fact by inference. This is what is referred to as circumstantial evidence.

Circumstantial evidence is the proof of facts by direct evidence from which you may infer other reasonable facts or conclusions.

Now, in the absence of direct evidence, circumstantial evidence, by itself, will justify a finding of guilty if the circumstances are entirely consistent with the defendant's guilt, are wholly inconsistent with any possible theory of the defendant's innocence, and are so convincing as to exclude [2962] a reasonable doubt of a defendant's guilt.

Now, where the evidence is both direct and circumstantial, the combination of the two must satisfy you of the defendant is guilt beyond a reasonable doubt.

Now, you may not make one inference from another inference. However, you may draw more than one inference from the same facts or circumstances.

If the circumstances create inferences that are equally consistent with either innocence or guilt, such inferences must be resolved in favor of a defendant's innocence.

Now, the evidence does not include the opening statements, or the closing arguments of

counsel. The opening statements and the closing arguments of counsel are designed to assist you, but they are not evidence.

Statements and answers that were stricken by the Court, or which you were instructed to disregard are not evidence and must be treated as though you never heard them.

You must not speculate as to why the Court sustained the objection to any question on what the answer to such question might have [2963] been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

Now, credibility. You are the sole judges of the acts, the credibility of the witnesses, and the weight of the evidence.

To weigh the evidence, you must consider the credibility of the witnesses. To do this, you will apply the tests of truthfulness which you apply in your daily lives. These tests include: The appearance of each witness upon the witness stand; the witness's manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, to hear, and to know the things concerning which the witness testified; the witness's accuracy of memory; the witness's motivation; that is, what did a particular witness have to gain or lose by testifying as he or she did; the witness's frankness, or lack of it; intelligence, interest and bias, if any, together with all the facts and circumstances surrounding the testimony.

Applying these tests, you will assign [2964] to the testimony of each witness such weight as you deem proper.

Now, you are not required to believe the testimony of any witness simply because he was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief, and what testimony is not worthy of belief. Now, expert witnesses.

Generally, a witness may not express an opinion. However, one who follows a profession or special line of work may express his opinion because of his education, knowledge, and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

Now, questions have been asked in which the expert witness was permitted to assume that certain facts were true and to give an opinion based upon such assumption. You may determine whether the submitted facts, upon which the expert based his opinion, are true. If any assumed fact was not established, you will determine its effect upon the opinion of the [2965] expert. However, as with all other witnesses, upon you alone rests the duty of deciding what weight, if any, should be given to the testimony of the expert. In determining its weight, you may take into consideration the witness' skill, experience, knowledge, veracity, familiarity with the facts of this case, and all the other usual rules for testing credibility and determining the weight to be given to the testimony.

Now, the burden of proof. The State has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the symptoms of death.

Now, reasonable doubt. Now then, what is reasonable doubt? The Legislature of the State of Ohio defined reasonable doubt as follows:

"Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly [2966] convinced of the truth of the charge.

"Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.

"Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Outweigh, now, to outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.

Now, it is the quality of the evidence that must be given primary consideration by you. The quality of the evidence may or may not be commensurate with the quantity of the evidence,

that is, the number of witnesses or exhibits presented in this case.

It is not only the quantity of the aggravating circumstances versus the quantity [2967] of the mitigating factors which is to be the basis of your decision. The quality or importance of the mitigating factors and the aggravating circumstances must also be considered.

Now, aggravating circumstance. What is an aggravating circumstance?

In this case the aggravating circumstance are the specifications upon which you returned guilty verdicts in four separate counts of the indictment.

In count one, aggravated murder, the murder of Horace Rickerson with prior calculation and design, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed Brian Warford.

"Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed [2968] Timothy Sheehan.

"Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender attempted to kill Coletta Dartt.

"Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of the course of conduct in which the offender attempted to kill John Hardaway."

In count five, aggravated murder, the murder of Timothy Sheehan while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of [2969] conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed aggravated murder and that the victim of the aggravated murder was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"Six, that the defendant committed aggravated murder and that the offense was committed while the offender was committing or attempting to commit or fleeing immediately [2970] after committing or attempting to commit an aggravated robbery, and that the offender was the principal offender in the commission of the aggravated murder."

In count six, aggravated murder, the murder of Timothy Sheehan, with prior calculation and design, they are as follows:

"That the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"That the defendant committed the offense [2971] of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed the offense of aggravated murder and that the victim of the aggravated murder presented above was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

In count eight, aggravated murder, the murder of Brian Warford with prior calculation and design, they a re as follows:

"One, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely killed Timothy Sheehan

"Three, that the defendant committed the offense of aggravated murder and that the [2972] offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill Coletta Dartt.

"Four, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender

purposely killed Brian Warford and also purposely attempted to kill John Hardaway."

Mitigating factors, what then are mitigating factors? Mitigating factors are those which, while not excusing or justifying the offense, or offenses, may, in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment.

These mitigating factors include, but are not limited to, the history, character and background of the offender and the following factors:

One, at the time of committing the offense the defendant because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to [2973] conform his conduct to the requirements of the law. Two, any other factors, that are relevant to the issue of whether the defendant should be sentenced to death.

Now, consider the counts separately. Each count is a separate and distinct matter. You must consider each count and the evidence applicable to each count separately. You must state your finding as to each count uninfluenced by your verdict as to any other count.

Verdict, the procedure which you must follow in arriving at your verdict in this sentencing hearing is set forth in Section 2929.03 of the Revised Code of the State of Ohio. A summary of that section provides that you, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine

whether, beyond a reasonable doubt, the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case.

[2974] If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstance in each separate count outweighs the mitigating factors, then you must return that finding to the Court.

I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.

A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.

On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to [2975] recommend to the Court.

The recommendation shall be one of the following:

One, that the defendant Frank G. Spisak, Jr., be sentenced to life imprisonment with parole eligibility after 34 years of imprisonment, or two, that the defendant, Frank G. Spisak, Jr., be sentenced to life imprisonment with parole eligibility after 24 years of imprisonment.

In this matter, your recommendation is binding upon the Court, and I, the Judge, must impose the specific life sentence you recommend.

Now, ladies and gentlemen, I may as well say something about the verdict form right now. There are two sets of verdict forms, one, "We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstance which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.

"We the jury recommend that the [2976] sentence of death be imposed and that the defendant Frank G. Spisak, Jr." – there is a spot for twelve signatures. All twelve of you will sign it if that is your verdict in this case.

There are four separate verdict forms for counts five, six and I believe it is eight. Now, there is also a set of verdict forms, same count numbers, read as follows:

"We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.

"We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving" -- there is an asterisk for a spot on the verdict form for you to fill in either 20 or 30 years of imprisonment. And again, all twelve of you must sign whatever verdict it is you arrive at must be signed in ink.

Now, you must not be influenced by any consideration of sympathy or prejudice. It is [2977] your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of court to your findings, and to render your verdict accordingly.

In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

If, during the course of the trial, the Court said or did anything that you consider an indication of my view of the case, you are instructed to disregard it during your deliberations.

Now, your initial conduct upon entering the jury room is a matter of importance. It is not wise immediately to express a determination, to insist upon a certain verdict, because if your sense of pride is aroused, you may hesitate to change your position even if you decide you are wrong.

Consult with one another, consider each other's views and deliberate with the objective [2978] of reaching an agreement, if you can do so without

disturbing your individual judgment. Now, each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the other jurors.

Now, at this time I'm going to excuse the alternate jurors. Now, you will not participate in the deliberations of this case. However, I'm going to keep you here. Okay. Why don't you put them in Judge Aurelius' room. Now, you are excused with the thanks of the party and the Court.

Okay. Now, before you go, I know, I think you are all going to be here, but I want to tell you now, you must not disclose what your verdict would have been in this case, or discuss anything about the case until you have heard that this jury has been excused from their duty in this particular case. Okay. Thanks [2979] a lot, and we will see you.

Now, the jury will be sequestered in its deliberation upon a verdict. Now, you can have no discussion among yourselves, or with anyone else regarding any aspect of this case whatsoever. You are also under the same instructions heretofore given as to not viewing television, listening to the radio, or reading news reports on this matter.

Now, ladies and gentlemen of the jury, after your verdict is returned and you are discharged as jurors in this case, you may discuss it with anyone 'you wish. However, whether you do so is a matter of your own personal choice. In the event that you

decide that you wish to discuss this case with someone, please do not speak for anyone or all of the remaining jurors in this case.

Now, the Court will place in your possession the verdict forms. The foreman or forelady will retain possession of these records and return them to the courtroom. The foreman will see that your discussions are orderly and that each juror has the opportunity to discuss the case and to cast his vote; [2980] otherwise, the authority of the foreman is the same as any other juror. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

Why don't you approach the Bench.

(Thereupon the following proceedings were had at the sidebar on the record out of the hearing of the jury as follows:)

THE COURT: Do you have any objections to the Charge?

MR. SHAUGHNESSY: This is an important time on my part. Could you add one sentence, you are not to be concerned with the other counts, the functioning of the – the sentencing is the function of the Court.

(Thereupon, the following proceedings were had in open court:)

THE COURT: Ladies and gentlemen of the jury, the only counts that you are to be concerned with, as far as sentencing, are the counts that I have

submitted to you, and in this instruction, and [2981] in this verdict form. All right. Good enough.

Ladies and gentlemen, you will have a copy of this written instruction. You will have, obviously, the verdict form, and you will have the evidence.

Now, I know it has been a real long day, and I'm sure you twelve people are tired. I'm certainly tired. What I would suggest you do is go back there, pick a foreman, decide what time you want to come back in here tomorrow morning, and let us know. We will discharge you for the evening.

It is seven o'clock, and I know you want to eat. You can go eat and resume deliberations in the morning. Okay.

(Thereupon, Court adjourned.)

APPENDIX J

TRIAL TRANSCRIPT OF DEFENSE CLOSING AT SENTENCING

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.

On behalf of the Defendant.
Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

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[2885]

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. SHAUGHNESSY: Your Honor, Ms. Patricia Cleary, gentlemen at the trial table, ladies and gentlemen of the jury.

Let me, be fore I start, again turn to Patricia Cleary and Don Nugent and extend my compliments to them once again for the very aggressive, and the very professional way they have handled the second portion of this trial, or really, in a sense, the second trial.

We are in this portion of the trial going to disagree, but that doesn't mean that we hold them in any lesser light as to the professional way in which they conducted themselves. And let me turn once again to Judge James J. Sweeney and certainly extend my compliments to you, sir, for once again, and I mean this very sincerely, for once again presiding most judiciously.

You know, ladies and gentlemen, I suppose it is like any other job being a lawyer, but there is an awful lot to say for working [2886] conditions on any job. And there is an awful lot to say about the people

you work for, and the people you work with, and as a lawyer, we talked about that the other day. I am proud to be a lawyer. I'm delighted to be a lawyer. And aside from the fact that I have trouble stopping when I talk, I enjoy being a lawyer very thoroughly. And part of that, and a good part of that is the working conditions, and they have been excellent, and overshadowed only by the people we work with, and I just couldn't pick a better bunch of people, and that goes to the Judge and that goes to the prosecutors and certainly to the detectives who I think you found when - they say that our Cleveland Police Department is the best, I don't think anybody has any argument with that at all.

Certainly, I would extend my compliments to Billy McGinty and Jack Gardner, they are fine lawyers. They are fine professionals. And that makes the job of being a lawyer, it's kind of fun to come to work, it's what I'm trying to tell you.

Lastly, ladies and gentlemen, and once [2887] again, let me extend my compliments to you. We talked about the reasons why the other day, and we talked about that letter. I Suppose that you are to be complimented in this sense that you have certainly at this point really long endured. My pal Jack Gardner insists that if it were marketed, I would be the surest cure in the world for insomnia. And if he ever gets it on the market, he probably will make a million dollars.

Let's go on and talk about why we are here. The Court has told you, and again, you will be charged much the same way, the way you were the other day. This is the sentencing part of the trial, the

trial within the trial. We kind of said this the other day when we talked to Dr. Bertschinger Saturday afternoon, as far as the defense in this case was concerned, ladies and gentlemen, what you heard since Saturday, that has been our ball game. You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors and before the prosecution rushes [2888] to point out, if any, let me add a comma, and say if any. That's probably the first thing that you have to find. Let's talk first about the aggravating factors.

I suppose so much could be said, but so little really needs to be said about the degree of the aggravating factors, clearly horrendous. No one who sat through this trial as a participant, the lawyer, a policeman, the defense lawyer, a Judge, a juror, a court reporter, the court attache, no one is ever going to forget the Frank Spisak trial, no matter how much time goes by.

Ladies and gentlemen, you are always going to be in addition to everything else that you are, if you are a truck driver, if you are a housewife, if you are a painter, whatever you are, in addition to that you will have taken on one other thing, you will have been a Spisak juror. And you are not going to forget, and none of us are going to forget, that cold day in February, February the 1st, 1982, because what you saw unfold here in the 60 or 70 witnesses, you didn't read just a news report, you didn't just see a [2889] minute-and-a-half on television, you saw a real three-dimensional you were there, is what it amounts to.

You were there, and on that cold day in February and, ladies and gentlemen of the jury, everyone of us who went through this trial, we know we can feel that cold day. And we can feel that, or see that cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is.

And, ladies and gentlemen, the reality of what happened there, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death.

And, ladies and gentlemen, none of us have. participated, none of us, and we all participated. None of us who participated are going to forget that.

And, ladies and gentlemen, none of us who participated are going to forget that hot night in June. And you can feel, you can feel, [2890] the loneliness of that railroad platform at 117th and Madison Avenue. And you can feel the heat of the night. And we can all appreciate, and you can understand, and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into the muzzle of a gun that kept spitting out bullets.

We were all with John Hardaway as he lay on that platform. And we all kind of cheered, didn't we, just a little bit, for the conductor who came along and used his good common sense to do the things that he did. And we all went through the surgery, and we were all kind of with John Hardaway when he came

in here and he still got some physical problems, and we can kind of all feel those, and we are not going to forget.

Ladies and gentlemen,- we can go back to Cleveland State University, and we were there. We were really there on that day early in August when Coletta Dartt went to the ladies' room and encountered the guy sitting here in the brown, and we all know the terror, or we can feel that right in the pit of our stomach. [2891] We know how that feels when she ran down the hall first left and then right, and tried to dodge, or did dodge the bullet. But we were there, and we know she feels. And is it an aggravating circumstance, indeed it is, ladies and gentlemen.

And, ladies and gentlemen, on the 27th of August we were in another laboratory, and we were all there because we could smell it. And we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they fell, because, ladies and gentlemen, we participated, and we were there.

And, ladies and gentlemen, on the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never what hit him, and we can feel that bullet hitting, and that is an aggravating circumstance. And we were [2892] there.

And we rode in that car night, that death car, and we were there so we can remember that hot night, and we could probably smell the stale beer in the car. And we can probably, maybe, smell some marijuana smoke, and we can feel the hatred, and if we listen closely, we probably could hear some jeers, some racial slurs. And we were with this guy here when he parked the car, the hunt car.

We were with him when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies and gentlemen, would you ever want any more aggravating circumstances? I don't think that you would.

There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky. Lucky, if you have a nightmare [2893] that will never go away. That's lucky, it may be, but it's an aggravating circumstance.

And, ladies and gentlemen, that's what you have got to weigh, the aggravating circumstances against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years, or fifty years, you are always going to be another Spisak juror, among other things, because isn't what you heard kind of a microcasm, and some of us, not all of us, are old enough to remember. Isn't what you heard just a microcasm of a twelve year

reign of terror that was unparalled in history, the Third Reich, and it was going to last for a thousand years.

And those clowns couldn't buy 12 or 13.

And if you listened closely, if you listened closely, ladies and gentlemen, to the hate that you heard in this courtroom, you were there in that laboratory, and on that railroad platform, and you were kind of there. They talked about crystal night. Now, ladies and [2894] gentlemen, if you listen closely, you can hear that breaking glass and somehow, somehow, you can twist this around, this sick distorted mind can twist around what they have, lab, and call crystal night when they broke out every window and ruined the business of every Jewish businessman in Germany. Crystal night, and it is funny? But to think if is awfully funny, you have to have a sick twisted mind.

You were here, and you were there, and if you listened closely, you can hear that. And I suppose, ladies and gentlemen, that's kind of a replay, an old newsreel of what he used to hear, sit back and listen real closely. And listen to this sick distorted mind, and you will hear once again kind of a muffled kind of dissent, but those hobnail boots on the cobblestone streets, but, ladies and, gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and you won't hear the gas in Auschwitz, because, ladies and gentlemen, it never made any noise in killing six million.

[2895] Aggravating circumstances, all the aggravating circumstances you ever want.

Turn and look at Frank Spisak. He has been here for six weeks now. And you probably haven't really looked at him. Turn and look at him. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much of life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford.

Now, the Judge has told you about mitigating factors. I suppose the word is somewhat self-explanatory, mitigating, a softening, it wouldn't be a good definition to say that it makes whatever happened less serious, but it is mitigating as to the blood, as to the one that caused all the horror that we have heard. The Court has told you that, or the [2896] Court will tell you that the defense on this portion could bring forward, and bring to you anything that the defense might consider to be mitigating, good deeds that a person might have done, an otherwise good life.

Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none.

And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.

The question then comes up, ladies and gentlemen, is there any mitigation. Is there any reason for you, ladies and gentlemen, to go back to your jury room, to go back through the exhibits, to ponder the arguments, if they are worthy of pondering, and to do anything other than to recommend to this Judge that [2897] at the earliest possible time he be strapped in the chair and electrocuted.

Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves. We talked about this on voir dire. We talked, alluded to it with the doctor. It has been mentioned in part. And, ladies and gentlemen, it is something that we've all grown up with, and something that we've always known. And it is something that is developed, and helps us, and will always be a part of us.

It is the reason that you get that little bit of a flutter when you hear them play the Star Spangled Banner, because, ladies and gentlemen, we are different. We are a humane society. If there is any reason, if there is any reason, ladies and gentlemen, for you to go back and not come back immediately and say, "Judge, we recommend to you that you electrocute Frank Spisak," it is going to be that which is within ourselves, that's that which makes us different.

You heard -- well, I think somewhere [2898] along the way it's been explained in the trial, it was explained, I think, on Saturday by Dr. Bertschinger, that his initial concern was to determine in this case, and every other case that he was brought into, whether or not Frank Spisak was content. Whether he has sufficient mental ability to be brought to trial, and of course, the doctor said that he did. And we don't, certainly, aren't faulting that, but the point of that is that we are a humane people.

And the reason that we don't bring an incompetent person to trial, I'm not suggesting that Frank Spisak is incompetent at all, but the reason that we don't try an incompetent man goes right back to the Judeo-Christian philosophy, the belief that our love, that our country has been founded on. And kind of can be simply said - that you can't commit a sin if you didn't have the ability to intend to do it.

If you couldn't form the intent, if you don't have the mental ability to commit the sin, no matter how horrendous, you have committed the sin, and we are different. [2899] We are different. We are a humane people and I think if you analyze it that we are proud to be different, and we are proud that we are different.

And the doctor went on the other day to tell us about criminal insanity. And it is kind of the same thing that we said, if you can't intend to commit a sin, to break the law, then as a humane people, different than most other countries, we don't terrorize one who can't intend to commit an offense, and we do that because we are a humane people.

And we don't find an insane man guilty, and we don't put an insane man in trial.

And the doctor said the other day that in describing this hearing, and you will recall that, and he said it much better than I'm going to say it, but that this hearing was in a sense a softening of the burden, the burden that the defendant will have to prove criminal insanity. And the reason we have this hearing is because we are a humane people. And the reason our general assembly has put this mitigating factor, the admitted ability, or the ability to substantially, and you will [2900] hear all that language from the Court, not insane enough to be criminally insane, but sick and demented so that the ability to intend is substantially reduced.

We are different, and that's why our Legislature has put that into the statute, because we are a humane people. So if we find a mitigating factor, ladies and gentlemen, it is nothing from within this sick tormented body, it is within ours. It is in the way we grew up, the things that we are proud of. The philosophies that we have, the beliefs that we are willing to stand up and be counted for, and we are different.

The doctor in explaining, and he did an excellent job, of course, his role as the counter, counter-part of Dr. Resnick in this case, and then being in the clinic, certainly, he demonstrated his experience, and his credentials, and I suppose may be we can illustrate it this way, that if we were to put three jars upon the Judge's Bench, I don't suppose the Judge would like that, but let me do it for purposes of illustration, and if we put a big jar up

there and a medium-sized jar [2901] up there and a small jar up there, and the Judge were to say to the defense, after the issue of incompetence, you must fill up this big jar and as to the issue of insanity, as the doctor said, the evidence has to fill up this medium-sized jar, and as to the mitigating factor, the evidence, at least, has to fill up this smaller jar.

Well, ladies and gentlemen, in the guilt portion of the trial, and I say this sincerely, we were wrong. We did not fill up the medium sized jar. We didn't have the evidence necessary to get that issue to you, ladies and gentlemen. We sincerely believe with the testimony that you heard, we have now filled out what we might call the smaller jar.

The issue is now there for your consideration. If you find it mitigation, then, of course, you must find it was in that smaller jar, too, outweigh the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us.

And, ladies and gentlemen, that is a pretty tall order. Let me just refer to the doctor's testimony, and it might be helpful. [2902] And, of course, what you will do, as you did in the guilt portion, you will recall all of the testimony. And the testimony, of course, is the answer from the witness stand to questions proposed by both the defense and the prosecution.

You recall Dr. Bertschinger saying, he said that Mr. Spisak in effect met the first prong of the statute, which is the test of legal insanity in Ohio, and that prong is that he has a mental disease, or defect. And then he said that he felt that he did not meet the other prong, or the remainder of the test.

And the test is that he would not know the wrongfulness, or inability, total inability, to refrain from the act. And you can recall his testimony, and I'm sure either Ms. Patricia Cleary, or Don Nugent will recall their questions on cross-examination.

And the doctor's testimony there, and I'm not going to, obviously, read the whole transcript, we are all here, and we heard it. I thought there were a couple of things, though that were helpful. I thought there were a [2903] few things that were helpful.

Well, I did say that, "Based on reasonable medical and scientific certainty whether at the time of the commission of the offenses, Frank Spisak, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law?"

And the doctor in answering that question said, "Yes, I do."

He was then asked, "What is your opinion?"

And he answers by saying, "It is my opinion that Mr. Spisak was mentally ill and that mental illness itself, does impair his reasoning to the extent he has substantial inability to know wrongfulness, or substantial inability to refrain."

And that doctor was allowed to testify, and was allowed to tell you, ladies and gentlemen, who will ultimately say to this Judge, we recommend that Frank Spisak be electrocuted, or we recommend that he be sentenced to 30 full years without parole [2904] on each count. You are allowed to hear that testimony. You are allowed to make that

consideration, not because of anything nice he did, not because of anything good he did, and not because he has a nice mother, or a nice wife, or a nice sister, and not because maybe he used to feed the pigeons on Public Square, or some other good deed, but because from within ourselves as a people we have instructed our General Assembly to make that inability, that substantial inability a mitigating circumstance.

Now, ladies and gentlemen, during the trial, and during this hearing, and I suppose we ought to kind of talk about those things that are issues, and those things that really aren't issues, and, ladies and gentlemen, let me assure you if there ever was any doubt, and I am sure that there wasn't, that I'm not an issue, Billy McGinty isn't an issue, and Jack Gardner isn't an issue. And what we did, ladies and gentlemen, or what we didn't do, that isn't an issue; but the issue is, and rather obviously, that the mental inability of Frank Spisak, that condition as described [2905] by Dr. McPherson, Dr. Bertschinger and Dr. Markey, is that a mitigating factor, and does that factor outweigh the aggravating circumstances.

Now, during the final argument in the guilt portion, it was argued that Frank Spisak quote, made everyone go through this. Well, ladies and gentlemen, that wasn't true then and it wasn't true now.

MR. NUGENT: Objection.

THE COURT: Overruled.

MR. SHAUGHNESSY: None of us, the State, the defense, the Court, none of us had any choice in

that matter, we had to go through with it. And mention was made yesterday that Frank Spisak entered a plea of not guilty, and not guilty by reason of insanity, and indeed, he did. And you heard the rest of it. In this country, and this is another thing, ladies and gentlemen, that makes us different, and makes us great, and should make us proud, the Court told you at the beginning about the presumption of innocence.

Billy McGinty, Jack Gardner and I didn't sit down before this trial and invent the [2906] presumption of innocence, and nor did we inscribe the form not guilty, and not guilty by reason of insanity. We are lawyers, not the framers of the constitution.

Ladies and gentlemen, I'm not an issue, and to that extent I differ with my colleague Don Nugent. Are we to be faulted because we are lawyers? Are we to be faulted because we did what lawyers are supposed to do? 'And, yes, ladies and gentlemen, in the guilt portion, in the guilt portion, if anyone hasn't heard it up until now, let the word go out loud and clear, Tom Shaughnessy, Jack Gardner, and Billy McGinty were wrong, dead wrong, very, very wrong. We did not establish that what we set out to prove, that we told this Court at the very onset, that Frank Spisak was not guilty by reason of insanity. We did not, ladies and gentlemen, fill up the middle jar.

We tried; but are we to be faulted; is that the issue here?

Is my ability as a lawyer, or should that make one bit of difference to you when you go back to your

jury room and decide whether to electrocute him, or lock him away for [2907] the rest of his life. I think not.

Ladies and gentlemen, if you disagree, and you are ultimately the ones who make that decision, if you disagree, ladies and gentlemen, come back and express your disagreement, but I don't think that I'm an issue.

And on that Saturday, on that Saturday you heard the examination, the cross-examination of Dr. Bertschinger, and the doctor. It's true, isn't it, said by the prosecutor, that you met Tom Shaughnessy here for the first time. And, ladies and gentlemen I couldn't, but I really wanted to stand up and say, "You are damn right it's true." And would it make any difference, Dr. Bertschinger is a professional, whether he met me once or twice or 50 times? What difference does it make? I wasn't the issue. He wasn't examining me. If I did something wrong by not meeting the man until he walked down the hallway after Dr. McPherson testified on Saturday, well, so be it. We have a Bar Association, let me suggest that after you reach your verdict, whatever it is, we can have at least [2908] sixteen letters to the Bar Association saying, Tom Shaughnessy, obviously, is to be faulted, he didn't talk to his witness.

Ladies and gentlemen, let's turn that around. Should I have, perchance, had lunch with Dr. Bertschinger, do you suppose if I sat Saturday at some nuturous place like the Theatrical Grill, and said to the waiter, another double for the doctor, and here, doctor, let me slide you a couple more hundred dollar bills, and you know, doctor, we have got big

egos as lawyers, and we want to win this case, and we want to convince everybody that he was insane at the time of the act, and, waiter, another double, and another couple hundred dollar bills, and doctor, do you think now that he is a little bit insane, do you think he is a little bit insane, and a couple more hundred, he is getting more insane now, isn't he, doctor, another double for the doctor, and another couple hundred, and he is really goofy now, isn't he, doctor?

We are lawyers, ladies and gentlemen. And we are damn proud of it. And I didn't meet with the doctor, and if that should be [2909] considered by you, I will make another confession, ladies and gentlemen, until the doctor strolled down the hall on Saturday morning, I never even talked to him on the telephone. Bill McGinty talked to him, Jack Gardner talked to him, some people in my office talked to him, I didn't talk to him. I read his report.

He is a professional. His opinion, and what he told you has nothing to do with what I did or didn't say to him.

And I did not meet with Dr. Markey. See, you can kind of have your -- the Judge said are you ready to argue, and I said yes, Judge, we are always ready to argue. And, see, you can always turn anything around, the innuendo is when I did something wrong, when I didn't talk to Dr. Bertschinger, and now that I talked to Dr. Markey, I guess I did something wrong there.

But we said to Dr. Markey, and you heard the testimony, Dr. Markey, I'm kind of a layman, I'm a lawyer from Buckeye Road, and I don't know too

much about these kind of things, but I know that it didn't take [2910] any ten hours, or two, hours, it took me about two minutes, Dr. Markey, to tell you that I think we have got just a guy that's just crazier than hell.

Now, you are the professional, Dr. Markey, Dr. Bertschinger, and Dr. McPherson, and Dr. Resnick, and those other people. Doctors, will you take a look at this guy, will you do the things that you do professionally, will you take the abilities that you earned in the profession, in four years of undergraduate school, and four years of medical school, and one year of internship, and two, or three, or four years of residency in time, in the United States, in time in the college, and experience on the job, doctor, will you take for a poorly man from Buckeye Road, will you take all that ability that you have and will you go back and talk to this guy that I made a snap decision about, that was crazy as hell, will you go and tell us professionally so that we can present it to the Court and to a jury.

And if I did something wrong, if that's [2911] to be considered, so be it. Ladies and gentlemen, we have got into kind of a little personality contest here. Yesterday the issue was will the real Mr. McPherson stand up, and we found out that we had two Mr. McPhersons. But now, ladies and gentlemen, if that's important, and presumably it was, or the one who brought it up wouldn't have brought it up, if that's important, and I didn't think it was, why did we bring it up?

We gathered here, and we have been together an awfully long time, and we know why we are here.

We are here to weigh the mitigating factors against the aggravating circumstances.

And we had a guy on the witness stand who, simple mathematics will tell us, was about 84 years old, and who I think, if you looked at him, and you got kind of a sense of what he was all about, that he was a kind man, and he was an intelligent man, and he was a caring man, and he was a patriotic man, and indeed he was an old man, and you kind of got that sense, but then what [2912] was the point? Is it aggravating, is it aggravating circumstances, or is it a mitigating factor to say doctor, D.A. Mr. McGinty, came out and talked to you, and identified himself. You see, if I have suggested to you, ladies and gentlemen, that these folks over here were being unprofessional and have done something wrong, then if I created the issue, then you ought to stuff it down my throat; but did we have to ask him those questions?

And you know that the doctor was confused, but so what. Did the doctor say anything to their Mr. McGinty that he wouldn't say to our Mr. McGinty? And you do know that when the doctor called, and was upset that I said to the doctor, come on, don't worry about it, it's not important, and you are a professional, doctor, you gave me your opinion.

And you know that the day the doctor walked into this courtroom, I said, well, doctor, this is a very good lawyer, Don Nugent, and this is a very good lawyer, Patricia Cleary, and they are prosecutors in this case. And we kind of had an opportunity to talk to [2913] you, or at least Billy has, and, doctor, why don't you take him across the hallway into an empty

room, and you folks sit down and chat, and after you do, doctor, I would like to talk to you a little bit more about what you are going to say when you take the witness stand.

And these guys, and again, I use the term, certainly a professional, naturally with Patricia Cleary, these guys are professionals, but it is an issue, ladies and gentlemen. I didn't bring it up, and I didn't want to bring it up.

And you heard yesterday, and I don't know whether this is an aggravating factor or a mitigating circumstance, kind of a thing that you are going to agree with me that it is neither that, indeed, Billy McGinty fell for some kind of good nature, kidding, and got in a panic, and called up the doctor and said, doctor, are you really licensed to practice.

Well, so, you know we fell for a little kidding. Again, that doesn't, I suppose, say a lot for our astuteness, but we are not the issue. And I suppose if it is a mitigating [2914] factor, that would be all right with me, but if it is an aggravating circumstance, it probably wouldn't. I really don't think that it is either. I don't think that you do. And you recall in earlier argument -- and by the way, by the way, so nobody is wondering about this, we are advocates. And, you know, the word advocate kind of, when you come down to it, kind of means to sail.

And you know that I have a point of view, and, my goodness, I don't think it comes as any great shock to anybody that indeed in a real sense, I'm an advocate, or trying to sell you my point of view. And I don't think you are going to be shocked to know that Don Nugent is an advocate, and Patricia Cleary is an

advocate. And they are excellent advocates. And they are going to try to tell you their point of view. Ladies and gentlemen, you did hear in the argument, and when I argue with Don Nugent, I don't mean it to be personal. And I hope that, and I'm sure I know that, I can hope, I'm sure that when we walk out of this courtroom that I will have the same respect, and we will have the same friendship [2915] with both of these fine lawyers; but I have got to argue because the Judge said was I ready for argument, so let me argue just a little bit.

Now, Don Nugent argued in the guilt portion, and that was fair enough, that was what he was supposed to do. He said Frank Spisak kind of sat here, I don't know if he said smirking, but that's what he did, and he waited until he heard all the witnesses, and then he kind of made up his defense.

There are a Couple of points there, ladies and gentlemen. The first of which is that, again, we are just the lawyers, and the order of trial is prescribed by the law, and the order of trial, obviously, is that the State goes first, and they did. And they did a most admirable job, culminated by one of the most brilliant and succinct final arguments that I have heard, and that was delivered by Ms. Patricia Cleary a week ago.

In any event, Frank Spisak had no alternative but to sit there on the first day of trial. He could not have popped up and said, now, I want to tell you what my defense is [2916] before anybody else says anything, that is so I won't be accused of sitting here and making it up after I heard the other evidence.

Well, now, you know that he couldn't do that. But if any question remains about that kind of sit down here and look at the reports. And you know that back months ago he was talking to Dr. Resnick, and he was saying the same things, and he talked to Dr. Althof and Mr. Williger, and a number of people. And he said about the same thing.

Ladies and gentle men, if it is important, and it may not be, but if it is important, he didn't sit here and make up his defense. And, ladies and gentlemen, on Saturday night when we ended, the question was asked of the doctor, and again, the lawyers aren't the issue, but Dr. -- and I don't remember how it was phrased, and if I'm inaccurate, Don Nugent will straighten it out, because he keeps better notes than I do. Well, kind of like doctor, these guys went and they got your opinion, and then they went and got somebody else's opinion, and maybe they didn't like that, and they went and got another opinion, and another [2917] opinion, and in all they got five opinions.

Well, I don't know if you think that's important. Well, make it important, and go back and talk about it. But do you suppose that the lawyers, the lawyers in this case, where a man very well may be electrocuted, ought to be bolted if they get a second opinion, or a third opinion, or a fourth opinion, or even a fifth opinion? A lot of people have relatively minor medical problems, and they go check with another doctor.

And you heard what the doctor said about the objective. And you heard what the doctor had to say

about the state of the argument. And that respected doctors did disagree.

Of course, in this case they all agree. They all substantially agree, all five. All five said to us that he didn't fill up the middle jar, but all five, all five said that he filled up the smaller jar. The jurors may now consider whether that mitigation outweighs the aggravating circumstances. And you heard the doctor say that it wasn't an exact science. Here's not two and two is four. And you heard the doctor, the [2918] doctor say that a couple hundred years ago, and we don't think of 200 years ago as being that unenlightened, we had a guy around then by the name of Benjamin Franklin, he had already invented electricity. And we had a guy by the name of Thomas Jefferson, and some other fellows that did a pretty nice job on a document called the Constitution of the United States of America.

And we think of those folks as being pretty enlightened, and they were: but at the same time they were, their contemporaries in the medical profession were sitting people down in chairs, putting hoods on their heads, and spinning them around, and that was thought to be a cure for the dementation, the twisted minds of the day.

Somewhere along the way, we heard that earlier in our history, the learned medical men, the respected medical men of the day, thought that burning witches was the way that problems ought to be handled f if indeed they were witches. And they were no less respected. The doctors in this case, and that seems to defy the laws of probability, the [2919] gambler's chance, they all five substantially agree

because they all did agree, or they all agree that the argument of the psychiatrist is based on philosophy and theory. And they all did agree. And they all did, or they all do agree that indeed we filled the smaller jar, or the smaller of the three. And by calling it the smaller, don't let me suggest to you that it still isn't a substantial burden, but it is now there before you, and you may consider it.

I think the doctors laid to rest the idea, or the thought that, well, you take 24 hours out of some guy's life, and he is a nut. And that maybe 23-1/2 of those hours he is going to be sane and rational, and do sane and rational things, and then for maybe just a few minutes do something bizarre. And I thought the one doctor said it very well, or at least answered the question very well, you know, even Jack the Ripper didn't spend 24 hours a day strangling ladies in London with silk stockings.

The result is that you don't explain away a sick, demented mind by saying that occasionally, or much of the time that a person [2920] and I think the doctor explained that, that the person did normal things. And even there, you will recall the getting along well argument, why he was getting along well at work, wasn't he, doctor. Well, if getting along well is wearing a White Power T-shirt and getting into beefs with the union steward, I suppose then that we will say that was getting along well.

And if getting along well in your neighborhood is keeping your across-the-hall neighbor in somewhat of a constant tizzy, not knowing if you are a fag or a transvestite, or if you are going to start shooting up the place, because you heard Sharon tell us that he

kind of always shoots up the place, or shot out the window, or something, then if that's getting along well, I suppose that we can lay that to rest then. Or if being whistled at by your neighbor, young Jeff, if I walked out of my house and the next door neighbor whistled, I probably would be inclined to punch him, or say something smart. but I wouldn't go home and say to my wife, Margaret, dear, I am certainly getting along with my neighbors very [2921] well, Joe Blow next door just whistled at me and smirked. I think that I wouldn't do that.

Now, ladies and gentlemen, talk a little bit about that later, but one of these two fine prosecutors, and I don't know which one, Patricia Cleary, or Don Nugent are going to argue. What I say to you here will be the last opportunity ever in this world, you all say thank God, that I will get to address you. And you are going to, whichever one it is going to be -- if it's Don Nugent, I suspect a barn-burner of an argument. If it's Patricia Cleary, I expect a model of succinct logic. Whichever it is, it is going to be better than what I have done, and I have got no problem with that. In addition to being humble, I'm somewhat modest. The point being, never again will I get a chance. In all of the arguments with my wife, I never had the last word. I suppose I should be used to it.

But you are going to notice my discomfort, and all I can do, all Billy McGinty can do and all Jack Gardner from this point on in, is sit [2922] there and squirm and say to ourselves, my God, would I like to be able to jump up and give them a snappy answer, because I could straighten them out on that, but the

rule of the game, and Spisak's lawyers are content and happy with those rules, are that I address you, and then he does.

And I would like to be able to answer his arguments, but I won't be able to. I can only just sit there and squirm.

Whoever argues, ladies and gentlemen, I suspect that somewhere along the way, and again we are advocates, that you are going to be exhorted to, don't be afraid to come back and vote death.

Well, ladies and gentlemen, if someone suggests to you that you don't have to be afraid, if someone says to you, don't be afraid, well, ladies and gentlemen, look that person in the eye and say, you don't have to tell me that. You don't have to tell me not to be afraid because it was about now five weeks ago, it was about five weeks ago when I stood, and I looked him right in the eye, and I said when I stood there about five weeks [2923] ago and raised my right hand and took the juror's oath, I knew what I was doing. I knew what the responsibility is. And I am here to listen to the facts, not to be having it suggested to me that I don't have to be afraid because Mr. Prosecutor, or Ms. Prosecutor, when I stood and raised my right hand, I was telling you and the whole world that I could take the heat. That I can take the heat, and for the balance of this trial, I will stay in the kitchen.

So Ms. Prosecutor, or Mr. Prosecutor, you don't have to tell me that I don't have to be afraid.

Ladies and gentle men, we talked about this before. No matter what else you are, you have now

added another dimension to your lies. Whatever you are, whatever you become, part of you is always going to be, you are a Spisak juror. And you know, ladies and gentlemen, your position is not now, nor will it be in the future, inviable in this respect, and that is as a Spisak juror you will be damned if you do and you will be damned if you don't.

[2924] Ladies and gentlemen, you will be second-guessed, and you will be criticized

MR. NUGENT: Objection.

THE COURT: Sustained.

You are to disregard those remarks.

MR. SHAUGHNESSY: All right. You will always be a Spisak juror. Being afraid, you agreed with us that you could take the heat. You agreed with us that you would stay in the kitchen and do the job. And the job simply is to put personality aside, to weigh the mitigation, the smaller of the three jars, with the aggravating circumstances, which no question about it are substantial.

Now, why don't I suggest this at this time, and again, the job is a big job, but I suppose it can be well done. Again, the result of a simple equation, that simple task not so simple, we all know, but after weighing those mitigation factors against the aggravating circumstances. And once a gain the lawyers are not the issue.

If I have done anything. and it has been a long time, if I have done something wrong, if I have offended anyone by anything that [2925] I said, or did, or didn't do, I would ask if you would while you

are deliberating, and until you reach a verdict, whatever it may be, to lay that aside. If you were offended, at the appropriate time it would be certainly a proper question after you reach the verdict if you have got a bone to pick with me, I'm out on Buckeye Road at 11510, and I'm out there nearly every day, and a lot of nights. Call me up and say, look, I had to endure the things that offended me for the last six weeks, and I feel strongly enough for I want to call you and I want to tell you about it; but the point is if I have done something, don't let it be part of your decision. Don't let it weigh either as an aggravating factor, or as a mitigating circumstance.

Now, certainly, and it probably doesn't have to be said, but that's never stopped me before, I will say it anyway, what you do, and what you are going to do, is important tomorrow, or the next day, or the day after, whenever the cameraman is going to pack away his camera, and he will leave, the spectators [2926] will fold up these extra chairs, and they will leave, and the lawyers on both sides will go about doing some other things, and if you came back here in a month, there would be something else going on important to the people who are here then, for sure, but the Spisak trial will have ended; but, ladies and gentlemen, what we do here, and I'm not suggesting in any way, and I'm not trying to give anybody a guilt trip, but what we do here is vitally important as a people, as a humane people, and that's why it is important to weigh it partially and fairly and be loyal to that oath that you took.

You are not going to be guided by sympathy, and you are not going to be provoked by fear; but, ladies and gentlemen, it is important because what we do as a people long after the cameras are packed away and the extra cares set aside, that decision will remain, And we said the other day, and let me remind you again, that this trial is going to leave a mark, certainly, on everyone. And it may take a day, it may take several days for you to realize that; but the sordidness, [2927] the awfulness of what we have experienced has to leave us.

Ladies and gentlemen, it has to leave us a little bit older, and it has to leave us a little bit more jaded, and a little bit more hurt. My God, you've looked in the back of the court room, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. And we are all going to be a little bit wiser, we are all going to be a little bit more jaded. And maybe, as I said the other day, the sun won't really look as bright, and the air won't smell as sweet, and the air won't sing as nicely, and that's a shame, isn't it? It's a real shame that we can't all be back in the doll house existence where we once were, where Bambi ran in the forest and every thing was good, and there was no evil.

We have seen too much of it here.

We are human people. And if we are older, [2928] and a little bit more tired, and if we got a few tears in our eyes, and we should have a lot, we can still be proud. We can be proud because we are a

humane people. And we can be proud whatever we do. And please, I'm not suggesting a guilt trip, whatever you do, we can be proud because we lived up to the oath that we took.

And I suggested the other day, and I suggested it, yes, before, and I suggest it again because I think it kind of says it all. When we leave here, what we will have left is our memories. We are proud to be lawyers. You are proud to be jurors. These guys can be proud to be prosecutors. These policemen can be proud to be policemen, because they are darn good policemen. And this Court can be proud to be a Judge, because he is a darn good Judge.

And again, whatever you do, we are going to be proud of you. And let that memory be as I said the other day.

And I think it is true that God gave us this thing called memory, this computer that stores up those things that make up our own [2929] worth. God gave us memories so that we could have those roses in December. I have never been in a longer trial. I have never been in a trial that has been any more important, and to everybody, from the back of the room to the front of the room. I have never had the opportunity to work with a nicer bunch of people, and folks, I'm proud of that. And thank you very much.

THE COURT: Thank you, Mr. Shaughnessy.

Ladies and gentlemen, I know I'm working you a little late. I appreciate your patience. Why don't you go back there, stretch for a couple of minutes,

throw some water on your faces, we are going to finish this case.

Remember the admonitions.

(Thereupon, a recess was had.)

THE COURT: Mr . Nugent, you may begin your argument.

MR. NUGENT: Thank you, Judge.

APPENDIX K

EXCERPTS FROM TRIAL TRANSCRIPT OF WITNESS TESTIMONY OF OFFICER HARVEY BEAVERS

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.

On behalf of the Defendant.
Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

Volume 3 of 10

[1108]

THURSDAY MORNING SESSION, JUNE 30, 1983

THE COURT: You may be seated. Ladies and gentlemen, we are going to work until noon today. Okay. Something has come up we have to attend to. Call your next witness. Step forward and raise your right hand and the bailiff will swear you in.

THEREUPON, the State of Ohio, to further maintain the issues on its part to be maintained, called as a witness HARVEY BEAVERS, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. NUGENT:

***

Q: Would you explain for us what those are and what he said in response to those rights?

A: We explained to him the Miranda rights. We told him he had a right to remain silent. Anything he said could and would be used against him in a court of law. We told him he had a right to an attorney either appointed or retained. If he could not afford an attorney, one would be appointed for him.

Then I asked him if he understood these rights and he stated that he did. Then I asked him if he wanted to talk to us, and he stated that he did.

***

[1113]

Q: Would you tell us in best detail that you have, the conversation you conducted with the defendant Spisak, tell us what you said, what you or Detective Taliaferro said during this conversation.

A: Well, first of all we went into several areas of Mr. Spisak's life. We talked about his childhood. We talked about his married life. We talked about [1114] his job classifications. We then went into the incidents themselves one by one.

We started in with Reverend Rickerson and I asked Mr. Spisak, or I asked Frankie why did he kill Reverend Rickerson, and he said that Mr. Rickerson was a man of the cloth, a Minister, and Mr. Rickerson had made a homosexual pass at him and he shot him.

I asked him what led up to this. He stated that he was in the men's room at Cleveland State University in early February, and Mr. Sheehan had walked into the men's room earlier and Mr. Sheehan had made a pass at him, and he decided that he would let that pass.

Mr. Sheehan then left the men's room and Mr. Rickerson came in right behind him, and he stated Mr. Rickerson took a seat in one of the stalls and then made a homosexual pass at him.

He stated that he was going to leave that alone, too, but he decided that he was a Minister, a man of the cloth, and he indicated to him that he wanted a homosexual experience and he decided that he would give him the ultimate blow job and he blew him away.

[1115]

Q: Did the defendant Frankie indicate to you how he knew that the Reverend Rickerson was a Minister or a man of the cloth?

A: Yes, sir. Frankie was a student at one time at Cleveland State University and on various occasions he would return to the campus of Cleveland State University. So he knew Horace Rickerson. He knew Mr. Sheehan also, or knew of him.

Q: Now, after did he tell you anything further about where he got the gun, anything about the Reverend Rickerson's killing?

A: The Reverend Rickerson's killing and the guns I did not go into because I was not familiar with the weapons involved in the killing, so I did not go in to the weapon end of it.

I did ask him, as I say, we went through it one by one. And I then asked him about Mr. Sheehan's homicide.

Q: Okay. And what did he tell you about that?

A: He stated later on that he, I guess, in early August, he was at, again, at Cleveland State University, and he entered the men's room. And Mr. Sheehan came in and he felt that Mr. Sheehan probably remembered him from the time Mr.

Rickerson was [1116] killed since he was in the room prior to Mr. Rickerson being killed.

He stated that he thought he was a witness to that and that he killed him, he shot him. He further indicated that Mr. Sheehan was the keeper, or the custodian at Cleveland State University and that it was his job to keep the university clean, to keep the men's room clean, and keep any filth out of the men's room. He stated that Mr. Sheehan did not do this, and that he was a part of it. He knew what was going on and as a result of it, he did not do his job.

And he did what he had to do, he killed him.

Q: Did he indicate to you whether he took any property or any items from Mr. Sheehan at all?

A: He did not indicate that to me, sir, to my knowledge, no.

Q: Did he say anything else about the reasons, other than the fact that he thought that Sheehan was a witness to the Rickerson homicide, or a witness to him being there, and that Mr. Sheehan was the keeper of the grounds at the Cleveland State University?

A: Well, and further, after he indicated the reasons for killing Mr. Sheehan, he went back to [1117] Mr. Rickerson and what-have-you, he made the statement, he stated that the Bible stated that the wages of sin is death. And that Mr. Rickerson had been paid just as Mr. Sheehan had been paid.

Q: Did he quote a particular section of the Bible for that, or a particular writer of the Bible?

A: To my knowledge, no. He just made the statement.

Q: After he made these comments about the Reverend and Mr. Sheehan, what next did he say?

A: I then asked him about Brian Warford. And he stated that he was just driving down Euclid Avenue. And he observed Mr. Warford sitting in the bus stop. And he turned his car around, parked, got out of the car, and walked up to Mr. Warford, and shot him. I then asked him, I said, did Mr. Warford say anything to you? He said, no, he did not.

I said, did you say anything to him, to Mr. Warford. He said, no, I did not. He said he never knew what hit, him. I then asked him, did you take anything from the body of Mr. Warford? He said he didn't have anything to take.

[1118]

***

Q: Now, did you ask him what he was doing that night to be driving up and down Euclid Avenue?

A: Yes, sir. We talked to him about his activities during the night and what-have-you. He stated that of times he would just drive around and sometimes he would just walk into the neighborhood, or drive in to the neighborhood, hoping that a black would say something to him, or do something to him, so that he would shoot him.

Q: All right. So he did indicate to you there a number of times he was out looking for a black person to shoot, but he didn't shoot?

A: Yes, sir.

Q: And then on the evening that Brian, or the early morning that Brian was gunned down, did he tell you what his purpose was in going out driving [1119] around?

A: No, sir, other than for him to say that he oftimes drives around looking for something to happen.

***

[1120]

[A:] that there came a time when he was not [1121] working regularly and then he was eventually laid off and at this time he felt that he could fully focus on that which he was thinking and that which he wanted to do.

Q: All right. Did he tell you what he was thinking and what he wanted to do?

A: Yes, sir. He admitted to being a member of the Nazi Party. He admitted to hating blacks. And he admitted to hating Jews. In his hatred for blacks, it was basically limited to men, to black men.

***

[1127]

Q: Did he indicate whether he had any regrets when he was caught?

A: He had regrets, yes. His regret was he was caught and he did not -- he would not have a chance to finish his work, but he stated that someone would pick up the battle for him and finish that work which he had started.

***

[1131]

Q: Now, during the second conversation did he indicate to you other than his joy riding around looking for individuals to kill and he ended up with Brian one night at Cleveland State that he intended to carry his killing on at another campus?

A: Yes, sir.

To my knowledge he indicated three areas where he was going to carry out his further activity.

He stated he was going to go to the rotunda of Cleveland State and just open up on whomever was there. He stated he was going to further expand his feelings and his actions to the campus of Western Reserve University.

He also stated the one thing he really wanted to do was to go to Vel's Party Center which is between 105th and Euclid and Carnegie and he was going to walk in there with a machine gun and just open up on every black who was in there and then he was going to start on all the Jewish lawyers, one by one, he wanted to eliminate all Jewish lawyers.

Q: Now, sir, did he tell you about a time he went to Cleveland state University campus armed with a weapon in a book and there was a meeting of the [1132] top personnel concerning the killings that were going on on the campus?

A: Yes, sir. He stated one night he was on the campus of Cleveland State University and this was after the killings there. He stated there was a lot of top personnel at that meeting there and he stated he

was stopped by a Cleveland State uniform guard for being in a restricted area, and then the guard checked him out and let him go.

He stated he was on the elevator, he had gotten on the elevator and there was a black man standing on the elevator next to him.

He stated he thought that, you know, that would be a fantastic time to kill an individual with all of these top personnel, top police personnel people here, and then having a killing happen right in their midst.

He stated he took the gun out of his pocket and he was just getting ready to shoot this man when the elevator door opened and a white man stepped on and he stated he became highly upset so he put the gun back in his pocket and he was very, very angry at this white guy, the white individual for stopping him, stopping him from performing this act and it totally upset him so he got off the elevator [1133] and he went home, but this blew his night.

Q: So from what he told you he wanted to kill the black man, but because the white man got on the elevator, he didn't do it?

A: No, he didn't do it.

MR. NUGENT: Thank you, Detective.

APPENDIX L

EXCERPTS FROM TRIAL TRANSCRIPT OF DEFENDANT FRANK G. SPISAK

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.

On behalf of the Defendant.

Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

Volume 4 of 10

[1297]

THE COURT: You may be seated. Ladies and gentlemen, the State in this case has rested. Mr. Shaughnessy, do you wish to present testimony?

MR. SHAUGHNESSY: Indeed we do, sir. The defense, your Honor, will call Frank Spisak, who will testify in his own behalf.

THE COURT: Okay. Mr. Spisak, step forward, sir, raise your right hand, the bailiff will swear you in.

THEREUPON, the Defendant, FRANK SPISAK, to maintain the issues on his part to be maintained, offered himself as a witness in his own behalf, who, being first duly sworn, was examined and testified as follows:

[1298]

DIRECT EXAMINATION BY MR. SHAUGHNESSY:

***

[1309]

Q: Now, if you liked your studies, if you liked the courses, tell the folks here, if you will, after having taken college prep, why did you cut your college

career, what some of us may think, why did you cut it short after that period of time at Cleveland State?

A: Two reasons: A: It was dollars and cents. I couldn't afford to continue my schooling on my own; and, B: I was devoting a lot of my time and energy to political activity at that time and I decided to become active in the American Nazi Party local unit here in Cleveland, Ohio.

Q: Is it fair to say that your political philosophies, your desire to become active in the Nazi Party, that then took over your earlier desire to go to school?

A: Right. I still had a desire to go to school but you can't be everywhere all at the same time.

***

[1338]

Q: Let's digress for a moment. You told us that in 1971 then you were working, working at Kay's Book Store, and you had an interest in pursuing activities with the American Nazi Party, and you then discontinued your schooling.

What got you interested in the American Nazi Party?

A: Well, I read a lot of books about Hitler when I was in school.

Q: High school?

A Junior high.

Q: All right.

A: Senior high, college.

Q: Why did you read a lot of books about Hitler?

A: I was interested in him.

Q: All right.

A: I wanted to know the truth.

Q: And you say you wanted to know the truth about what, Frank?

A: About the man and about that period of history in which he lived.

Q: All right. [1339] Based on your reading, did you learn what you perceived to be the truth?

A: Yes, I did.

Q: All right. Incidentally, what is the truth as you perceive it?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q: When did you first join the American Nazi Party?

A: In 1970.

Q: In 1970, which city, or where was it that you joined the American Nazi Party?

A: They had headquarters in Arlington, Virginia ever since 1959 when they were first founded by Commander George Lincoln Rockwell.

Q: All right.

A: And in that year the people of the City of Cleveland decided to open a local one on Clark Avenue, I mean Lorain Avenue.

Q: Lorain Avenue, about what cross street, for those of us who may not remember?

A: Right around St. Ignatius, 99th and Lorain.

Q: Near the West Boulevard area?

A: Right. [1340]

Q: All right. That was in 1959?

A: That's right.

Q: All right. Did you in fact then at that time become a member of the American Nazi Party?

A: Yes, I would say I was a member.

Q: All right. What did you have to do to become a member of the American Nazi Party?

A: Just join it.

Q: Well how did you do that? Did you go –

A: They had a little paper.

Q: Did you go someplace? Did you do something?

A: Fill out a piece of paper and you send in a couple of bucks every month.

Q: Did you go –

A: You get a neat little card you put in your wallet.

Q: A neat little card. What does the neat little card say?

A: I forget what it says, but it's got a Swastika on it. It's red, white, and black.

Q: Red, white and black. Are those colors relevant to anything?

A: Sure.

Q: What are those colors relevant to? [1341]

A: The flag that Adolf Hitler designed.

Q: The flag that Adolf Hitler designed. All right.

Your card was red, white and black, it had a Swastika on it, and was neat and you put it in your wallet?

A: Right.

Q: To become a member of the Nazi Party, did you have to go someplace to this headquarters, perhaps?

A: It helped if you hung around there, you know, and contributed to the work.

Q: All right. When you say to the work, did you hang around there and do some work?

A: Sure.

Q: What kind of work did you do, Frank?

A: Well, when they first opened the place, it was called a book store.

Q: All right.

A: Which was kind of misleading, because they didn't have many books in there.

Q: All right.

A: Because they didn't have much money, but I did the same thing there I did at Kay's, when people come [1342]in, they want to find some thing, I helped them find it.

Q: And that was books, presumably, unlike Kay's Books, that had something to do with the American Nazi Party?

A: Right.

Q: All right. Did they have regular meetings there?

A: No, they didn't have regular meetings, but they had this tape recorded telephone message. You call a phone number and there is a tape recording that gives little messages for about one or two minutes. You listen to it like a weather report, it tells you what's going on, that kind of thing.

Q: Would that be the American Nazi activities?

A: No, just what's going on in the world.

Q: I see.

A: Yes.

Q: Kind of a minute or two then summation of news then. All right. To become a member of the American Nazi Party, did you have to take an oath?

A: At one point in time, I did, yes.

Q: What oath did you take?

A: I took an oath of loyalty to the Commander of [1343] the movement.

Q: And who is the Commander of the movement?

A: Matt Koehl.

Q: And how do you spell that last name?

A: K-o-e-h-l.

Q: All right. Who is Matt Koehl? You told us he is the Commander, but where did he live, what does he do?

A: Sure. When Commander Rockwell was martyred in 1968 in Arlington, there was nobody to take over the party except for Matt Koehl, who was the designated successor. So he assumed the position of leadership.

Q: All right. And there came a time then in 1970 when you took an oath to do what?

A: Well, you take an oath of loyalty to the Commander, but the spiritual leader of the movement is and always will be Adolf Hitler.

Q: All right.

A: You've got to realize that.

Q What does the oath entail? What does one say when one takes the oath?

A: I don't remember the exact words, but basically what you are doing when you take the oath is you are [1344] declaring war on the society that exists today.

Q: And you are talking about the society where, in Cleveland, in this country?

A: All over the world.

Q: All over the world. Were you in favor -- did you voluntarily take that oath?

A: Yes, I did.

Q: Why did you do that?

A: Because the one world system today is totally opposed to everything that I believe and stand for.

Q: All right. Now, Frank, let's digress from this. Let me ask you, you told us about your apartment, you had two bedrooms, a living room, a kitchen, which after Laverne left had no ice box or stove. What kind of things did you have in your apartment?

A: Furniture, stereo.

Q: All right. A lot of tapes for the stereo?

A: Sure.

Q: What kind of tapes did you have in the apartment?

A: All kinds, music, speeches.[1345]

Q: All right. Speeches by whom, Frank?

A: Everything, Hitler, George Lincoln Rockwell.

***

One of them is a tape of a BBC broadcast. I think it was in 1940, or '41. And there is a BBC commentator that was given a translator right along, you can hear the Fuehrer in the background.

Q: You say the Fuehrer?

A: Yes.

Q: Of whom are you speaking?

A: Adolf Hitler.

Q: Adolf Hitler is the Fuehrer. [1346] What does Fuehrer mean in English?

A: It means leader.

Q: It means leader. All right. And after taking the oath, did you consider Adolf Hitler to be your Fuehrer, or your leader?

A: Sure.

Q: All right. Do you consider today that Adolf Hitler is your leader?

A: Definitely.

Q: Spiritual?

A: Definitely.

Q: Now, in taking the loyalty oath that you told us about, could you, at the same time, could you at the same time pledge the allegiance to the flag that you told us about at an earlier time, that's also a loyalty?

A: That's right.

Q: Are the two consistent, or inconsistent?

A: No, they are not inconsistent, because the American Constitution represents, as it was set up, no longer exists. The Constitution has been superseded by the Charter of the United Nations, and that's why the pledge of allegiance was removed from the schools.

[1347]

Q: All right. You feel perfectly at ease then today pledging allegiance to the flag of the United States, but at the same time telling us that your spiritual leader, at least, spiritual, is Adolf Hitler?

A: Adolf Hitler stood for an idea, almost the exact same idea that our founding fathers had, but the

United States is no longer run by the principles of the founding fathers. It is run according to the dictates of the one world leaders.

Q: And who are the one world leaders, Frank?

A: The Jews.

Q: All right. And does that upset you?

A: Yes.

Q: Does it upset you to the point where you would kill?

A: Yes.

Q: All right. Let's talk about a gentleman by the name of Reverend Rickerson. Do you know who I'm talking about?

A: Yes.

Q: All right. Do you know who killed Reverend Rickerson?

A: Yes.

Q: Who killed Reverend Rickerson?

A: I did.

Q: Why did you kill Reverend Rickerson?

A: I had good reason.

Q: All right. What was the good reason, Frank?

A: It was something he did.

***

[1349]

Q: Well, what are the names of the splinter groups then in which, Frank, in which you were attached?

A: The National Socialist Party of America, the American Socialist White People's Party and the Social Nationalist Aryan People's Party.

Q: Now, the word Aryan means what?

A: White.

Q: To get into the Party, the Aryan Party, the White People's Party, did you have to take an oath?

A: No, not a formal oath.

Q: Not a formal oath. How did you become, or how does one become a member of the three splinter groups that you told us you belonged to?

A: All one has to do is align oneself, declare oneself to be in agreement with what those groups stand for.

Q: Are you in agreement with what those groups stand for?

A: Yes. [1350]

Q: Is what those groups stand for, is that in disagreement with what you believe most people in America stand for?

A: No. I wouldn't say it is in disagreement with what most people stand for. I would say it is in disagreement with what the leaders are telling the people, what the people are being programmed into believing.

Q: You say people are programmed, who are they being programmed by?

A: The masses are being programmed by the news media, people who control all the thoughts of public opinion.

Q: And who are those people?

A: Jews.

Q: Exclusively Jews?

A: Almost exclusively, yes.

Q: Almost exclusively?

A: Yes.

Q: Does that upset you?

A: Yeah, sure.

Q: How are people being programmed?

A: When they watch TV, listen to the radio, read the newspaper, go to the movies, buy a book. [1351] That's all propaganda.

Q: And propaganda urging what or programming people to do what or be what?

A: Getting them to believe what the one world system wants them to accept as the facts and the truth.

Q: And what is that?

A: Any different things. One, that the races are equal, there is no difference between black and white.

Q: Is that true?

A: Of course not. There's plenty of differences.

Q: The difference is obvious, isn't it, white and black?

A: That's one.

Q: You find some other differences?

A: Sure.

Q: What other differences do you find? Intellectual, physiological difference, just like in school. The guys that got the best grades were the ones that performed the best. You look at history, the history speaks for itself. The white people have always created and [1352] maintained civilization. The black people have not done anything, and today they are breeding, breeding at a rate that will soon make the white people extinct.

Q: Does that upset you?

A: Yeah. We're talking about our survival.

Q: Did you ever decide to do something about that?

A: Yes.

Q: What did you decide to do about that?

A: Decide to take up arms against them.

Q: You used the expression declaring war some few minutes ago. Tell us what you meant when you joined the American Nazi Party, what did you mean, Frank, by declaring war?

A: The state of war has existed between the system and between those of us who believe as I believe ever since 1933.

Q: What happened in 1933?

A: In 1933 a lot of lives were liberated, the first branch of the white people from the yoke of servitude, they were suffering under the regime of the Chancellor of the German nation.

Q: And what was the name of the political party?

A: The National Socialist German Workers Party. [1353]

Q: What was the name of the party that you said something about the yoke of, whatever it was, what was the name of that party that had been in power?

A: Well, I don't recall the exact name of the party, but I know what they stood for.

Q: All right. What happened particularly in 1933? How did the transgression come about from this yoke of tyranny or whatever to the liberated Hitler party that you told us about?

A: The German people are tired of living under slavery. They wanted freedom, so they supported a man who gave them what they wanted and he was freely and duly elected to power.

Q: And you agree with that?

A: Sure. That's how this country came into existence. We didn't want to be under British rules, so we got together and we had a revolution, the same thing they did over there.

Q: And you agree then with the revolution?

A: There is nothing unAmerican about it.

Q: Is there anything that Hitler did that you don't agree with? [1354]

A: Well, maybe a few small things I don't agree with.

Q: Can you think of one?

A: No.

Q: You started to tell us about a decision you made somewhere along the way to take up arms?

A: Yes.

Q: What do you mean by that?

A: Take up arms means just what it says, take up arms.

*** [1362]

Q: So you had the force do it for you, the force of the gun powder, the force of the projectile, some inner force of what, can you explain what you mean a little bit better?

A: The force of God.

Q: The force of God?

A: With God all things are possible.

Q: With God all things are possible?

A: Even a blind man can hit a target if he is helped by God.

Q: A blind man, if he has the help of God, he can hit a target?

A: Definitely.

Q: Frank, do you believe in God?

A: Yes. [1363]

Q: One God or a number of Gods?

A: One.

Q: One God?

A: Yes.

Q: How do you rate Adolf Hitler and God at the same time, do you compare them at all?

A: Sure.

Q: And what is your comparison, what is the comparison in your mind?

A: I think Adolf Hitler was like Jesus Christ. He was the greatest man in the last two thousand years of man's history and he wouldn't have done the things he did unless God was helping him to do them.

Q: You say Adolf Hitler then, you see Adolf Hitler then as being, your philosophy is Adolf Hitler is an agent of God?

A: Definitely.

Q: You predicate that on the argument that he could not have done the things he did unless he had some divine intervention?

A: Definitely.

Q: What is your relationship with God?

A: We have a good relationship. It's personal.

Q: It's a personal relationship? [1364]

A: Yes.

Q: Can you tell us about it?

A: No.

Q: You told us about Adolf Hitler getting some help from God, about the inner force, the blind man being able to hit the target. Have you ever felt that you were an instrument of God or you were getting assistance, divine assistance?

A: Sure.

Q: And when do you feel that, Frank? How long have you felt that?

A: A long time ago.

Q: Did you feel this on February 1st, 1982?

A: Yes.

Q: You had taken up arms on that day, hadn't you?

A: I did.

*** [1396]

Q: Now, what do you believe you would give your life for?

A: I would give my life for the survival of my people and my race.

Q: And your people are the Aryan people?

A: Right.

Q: All right. You are in the men's room and the black man said something to you and you did what?

A: I shot him.

Q: How many times did you shoot him?

A: More than once. [1397]

Q. A lot of times?

A: Yeah.

***

Q: How did you feel, Frank?

You now have got your hand in your pocket, how did you feel?

A: Well, there was a hole in the wall and I couldn't see the whole man. I could only see, the [1398] part that I could see was his abdomen, the abdomen region which was exposed.

Q: Did you ever see that hole in the wall before, Frankie?

A: Yeah, but never anyone on the other side.

This guy was on the other side of that hole, and as I said, he was exposing himself and making these lewd obscene gestures at me while I was sitting on the commode.

Q: If you could only see the abdomen area why --

A: I couldn't see his face or anything, but I just aimed right through the part that was sticking through the hole.

*** [1415]

Q: Frank, why did you go in the Rapid Transit Station?

A: I thought I saw a black guy go in there.

Q: All right.

A: And I was going to go in after him.

Q: All right.

A: When I went in there, he wasn't there.

Q. Why when you saw a black guy on June the 4th, 1982 at 11:30 p.m. at West 117th and Madison, did you decide to go in after him?

A: Well, there were two white women that were down in the Flats at one of these disco places. I forget the name of the place, but I heard, and I read in the newspaper, when they came out of the disco and they went to the parking lot to get in their car, [1416] a black guy had abducted the two of them at gunpoint and he forced them in the car and one he raped and the other one he killed, he shot her.

Q: Does that upset you, Frank?

A: I figured there must be a blood atonement made for this crime.

***

Q. Tell the folks here, if you will, what do you mean by an atonement, or a blood atonement?

A: Well, the death of those, the death of that one white girl, and the other one who was raped, she suffered terrible trauma at the hand of this animal. There had to be -- something had to be done about [1417] that. If more people would do more things about it, this kind of stuff wouldn't go on.

Q: Now, the guy, the black man that you thought you saw go in the Rapid Station, did he have anything to do with that?

A: Sure.

Q: What did he have to do with that?

A: He is on the same side as the guy that did the killing and the raping.

Q: You are saying that because he was --

A: He was wearing the same uniform.

Q: All right.

Because he was black and because you felt the other person was black, that's why you went in after him?

A: The reason the women were attacked is because they were white. It goes on all the time.

Q: All right.

A: So when one side is waging war against the other side, the other side has to fight back.

*** [1421]

Q: All right.

What did you feel like when you went in after him?

A: I left like I had to get the job done, over with. There was urgency involved there, you understand.

Q: Why was there urgency involved?

A: Well, he already gotten away once, I couldn't let him get away twice.

Q: Why couldn't you let him get away twice?

A: I couldn't do it.

Q: Would the war have been lost if he had gotten [1422] away?

A: No, just the battle.

Q: Just the battle. He didn't get away, did he?

A: Well, it's strange, you know, I shot at him but he didn't die.

*** [1424]

Q: How did you feel after you saw him fall to the platform and you walked down the steps?

A: Pretty good.

Q: Pretty good.

Why did you feel pretty good?

A: I had accomplished something that evening for one thing.

Q: Did you celebrate then?

A: Yes, I think I did.

Q: What did you do when you celebrated?

A: I had a pizza and a couple of Cokes.

Q: All right.

Did you find out somewhere along the way that Mr. Hardaway didn't die?

A: Yes.

Q: How did you feel when you heard that news? [1425]

A: Kind of bad.

*** [1430]

Q: Do you think it's God's will that the university be closed?

A: Well, he wanted me to do what I could.

Q: You kind of feel maybe you failed God a little bit?

A: Well, I don't think so. I don't think so because I can get up here and give my testimony and that's worth a lot, it's valuable.

Q: You feel your testimony will be helpful in ultimately winning the war?

A: Sure, because this is what we need, what we needed all along.

We need somebody to get up here and take the stand and give a reasonable logical concise explanation for those things which must be done and this has not been done until now.

*** [1433]

Q: Where did you see Coletta Dart?

A: She was coming out of the rest room.

Q: Were you in the rest room?

A: I might have been, yes.

***

Q: But you saw Coletta Dart and what happened? [1435]

A: Well, I remember shooting at her.

Q: Yes.

Now, the war that you described that was going on was still going on on August 9th?

A: Sure.

Q: Was Coletta Dartt an enemy or was she a soldier?

A: Well, I overheard her making some conversation to her husband, I guess it was her husband.

I heard her testify here that it was her husband and they work there, he works there with her.

There was her and two other men in the room and they were making some conversation about our movement, about our party.

*** [1454]

Q: Frank, did you kill Brian Warford?

A: I shot him.

Q: And why did you kill Brian Warford?

A: It was my duty.

Q: What was the duty that led you to kill Brian Warford?

A: My duty is to inflict the maximum amount of damage and casualties on the enemies as I am able to do.

*** [1476]

Q: What did you do?

A: I walked across the dark, in the dark and empty campus from where I parked the car to Euclid Avenue and I looked around and I didn't see nobody on campus.

I couldn't figure out where all the police were because just a few days before they had all the [1477] excitement over there about the janitor being shot in the men's room and they were bragging or telling the

people that they had increased their security. They were telling the people they had around the clock patrols and it was going to be safe.

I didn't see nobody over there. I didn't see nobody in sight.

***

Q: Tell the ladies and gentlemen of the jury what happened.

A: When I got to the corner, he was still sitting there where I first saw him. [1478]

***

Q: He was still sitting there in the bus shelter?

A: Well, it looked like he was almost asleep. He had his head down like this (indicating), you know, his chin was touching his chest and he looked like he might have been sleeping there.

Q: When you looked at him, what did you see?

A: I saw one of the enemies that was sleeping there and I had caught him off guard.

Q: You caught the enemy sleeping?

A: Well, it's always best to attack at the point of least resistance or at the point where you can catch the enemy unaware.

That is always a wise strategy. Every good general knows that. Every good general knows that if he wants to be successful, so here I caught one.

Q: Did you see how young he was?

A: Yeah. I thought he looked like maybe about 19 or 20. [1479]

Q: 19 or 20, a young guy?

A: Yeah. It's best to get them when they're young.

***

Q: What did you do then?

A: I shot him.

Q: Did you have the gun in your hand?

A: It was in my pocket.

Q: You took the gun out of your pocket?

A: Sure.

Q: Did you point the gun at him?

A: Of course.

Q: What part of your gun did you point at him?

A: The head.

Q: Why did you do that?

A: Because that seemed like the best place, aim for head.

*** [1480]

Q: How did you feel pulling the trigger?

A: Good.

Q: Were you excited?

A: I felt like I was finally doing something constructive for my race and for my people.

*** [1780]

Q: Would you like to have your other guns back?

A: Yeah.

***

Q: What would you do with your other guns?

A: What would I do with them?

Q: Yeah.

A: I would use them to escape from jail.

Q: And would you keep your guns after you escaped from jail?

A: I wouldn't let no body take them away from me any more.

Q: What would you like to do with your guns if you weren't in jail and you had your guns?

***

A: I would go out and continue the war I started.

Q: Tell us about the war that you would continue, what would you continue doing? [1781]

A: I would continue to inflict the maximum amount of damage on the enemies as I am able to do.

Q: And the enemies, Frank, is who?

A: Blacks and Jews.

Q: All right. You told us -- you told Don Nugent this morning, didn't you, there was nothing wrong with your conduct?

A: What did he make that statement in reference to?

Q: Do you remember talking about killing Reverend Rickerson and trying to kill John Hardaway?

A: Sure.

Q: And shooting Coletta Dartt and killing Mr. Sheehan?

A: Sure.

Q: And killing Brian Warford.

A: Sure.

Q: You said there was nothing wrong with your conduct?

A: Right.

Q: And you think there is nothing wrong with your conduct now?

A: No.

OPPOSITION BRIEF

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2008

KEVIN SMITH, Warden

PETITIONER,

-vs-

FRANK J. SPISAK, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

There are aspects of Petitioner's Statement of the Case that are factually misleading as relates to the summarizing of the record specific to Petitioner's second issue, the ineffective assistance of Spisak's counsel. These facts and omissions will be addressed specifically in Respondent Spisak's reply.

In section C of Petitioner's Statement of the Case, it is noted that the Supreme Court of Ohio "reviewed and rejected all of Spisak's sixty-four assignments of error." Pet. at 9. While this is correct, it should be noted that the Ohio Supreme Court's decision gave no analysis or reasoning for any of its rulings in denying Spisak's numerous claims. Rather Ohio's Supreme Court merely grouped issues together and denied them with undifferentiated string-citations. Pet. App. at 305a-309a.

The Sixth Circuit granted relief on two separate grounds: the specific jury instructions and forms used at the mitigation phase of the case violated *Mills*, and the ineffective assistance of counsel at mitigation. These grounds are separate and independent and both result in sentencing phase relief. Even if one issue is deemed worthy of this Court's review, the other issue provides the same relief rendering further review merely advisory as the outcome of the case will not be affected.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to Spisak's *Mills* Claim.

1. The Sixth Circuit Properly Reviewed This Matter Pursuant to AEDPA.

The Sixth Circuit's original decision-making process fully comports with established *habeas* law and AEDPA. There is no conflict among the circuits applying such well established principles. While Petitioner continues to insist that the Sixth Circuit ignored AEDPA's restraints, Pet. 13, the Sixth Circuit has consistently and properly addressed the jury instruction analysis by the Ohio Supreme Court under §2254(d)(1), while acknowledging both the AEDPA's presumption of correctness standard and the "special deference" due state court findings. In its initial ruling the Circuit outlined the AEDPA standards and requirements as a precursor to the merits review. Pet Apx. F-32a-33a. In its Amended Order following this Court's remand order, and prior to additional consideration in light of *Musladin* and *Landrigan*, the Circuit reiterated the applicability of AEDPA principles of review. Pet. Apx. B-5a.

It remains well established that when a court cites the correct legal standard it is presumed that the court actually applied that standard. "There is no principle of law better settled, than that act of a court of competent jurisdiction shall be presumed to have been rightly." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005). *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee v. Delle Rose*, 410 U.S. 690

694-695 (1973) (per curiam). There is no evidence that the Circuit did not do what is said it did - apply AEDPA standards to this case.

On remand by this Court, the Circuit again directly acknowledged that the case is subject to AEDPA standards. Pet. App. at 5a; Pet. App. at 14a. In total, over the course of three opinions, the Sixth Circuit cited AEDPA or its standards at least eighteen (18) times. The Circuit Court properly reviewed this issue under AEDPA and determined that Spisak was entitled to relief.

Petitioner-Warden's argument reduces to nothing more than a disagreement with the conclusions reached by the Sixth Circuit Court. The Circuit's Amended Orders and its initial decision make clear that the Circuit Court thoroughly reviewed and evaluated the totality of the instructions, the state court decisions, and, applying the proper AEDPA standards, determined not only that the instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), but that the state court's determination to the contrary was unreasonable given the facts.

What Petitioner fails to explain as an initial matter, is that the state court 'decision' to which AEDPA is being applied was unarticulated and unreasoned. The Ohio Supreme Court's treatment

of this issue on direct appeal was limited to:

> In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, certiorari denied (1985), 472 U.S. 1032; *Maurer*, *supra*; *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795, certiorari denied (1986), 479 U.S. ___, 93 L.Ed.2d 165; *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13, 490 N.E.2d 906, certiorari

denied (1987), 480 U.S. ___, 94 L. Ed.2d 699; and *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383.

(Pet. Apx. H-306a). The *Mills* error was raised to the Ohio Supreme Court in Proposition of Law No. 54. The Sixth Circuit gave this decision all the "deference" it was due.[1]

---

[1] Arguably Spisak was entitled to *de novo* review because the Ohio Supreme Court opinion prevents unreasonable application of federal law review. That is because the court's opinion did not identify what law the court actually applied or its reasoning. It is not possible to determine whether or not the underlying decision was an "unreasonable application" of clearly established federal law since the court gave no indication of what law was applied. A state court must be aware of the federal law and attempt to apply it before there can be a determination that there was an unreasonable application of that law to the facts of the case. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The "unreasonable application" clause of the AEDPA is only applicable when the state court actually "identifies the correct governing legal rule." *Id.*

Federal courts may make a determination that a state court ruling is "contrary to" clearly established federal law even in the absence of any citation to or even awareness of clearly established Supreme Court precedent. *Early v. Packer*, 537 U.S. 3 (2002). *See also Mitchell v. Esparza*, 540 U.S. 12, 16 (2003)(reviewing only "contrary to" standard); *Bell v. Cone*, 125 S. Ct. 847 (2005) (same). The Court, however, has not applied this same reasoning to "unreasonable application" review under the AEDPA. Given the impossibility of determining whether an unexplained state court decision is an unreasonable application of clearly established federal law, the constraints of the AEDPA cannot limit federal court review.

It is problematic, of course, for Petitioner to argue that the Ohio court's decision was a reasonable application of clearly established federal law given such a cavalier disposal of Spisak's constitional claims in a capital case.

2. The Circuit's Opinion is a Straight-Forward Application of this Court's Precedence in *Mills v. Maryland*, 486 U.S. 367 (1988).

Contrary to Petitioner-Warden's claim that the Sixth Circuit "extended" *Mills* to a situation that *Mills* did not address, Pet.15, the Sixth Circuit's opinion is nothing more than the straight-forward application of *Mills* to the jury instructions and forms used in Spisak's trial. The core holding of *Mills* is simply that if the jury instructions and/or forms prevented a

---

A contrary policy or statutory interpretation would permit a state court to insulate its decisions from federal review by simply denying relief without any explanation of its reasoning or the cases it relied on. The federal courts would then be left to determine whether a decision was an unreasonable application of law without any guidance as to whether the state courts were aware of or attempted to apply the correct law. This situation would upset the traditional balance between state and federal courts established by principles of comity and would result in a suspension of the Writ and render the AEDPA provisions void and unconstitutional.

single juror from giving effect to mitigating evidence those instructions and forms violate *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The instruction given is identical in its impact to the instruction given in *Mills*. Looking at the instructions actually given demonstrates that Spisak's jury was repeatedly addressed in the collective and instructed that every decision was to be the decision of the jury. The constitutional question is "whether a reasonable jury would have interpreted the instructions in a way that is constitutionally impermissible." *Mills v. Maryland*, 486 U.S. at 375-376. "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom [v. Montana]*, 442 U.S. [510], at 516-517 [1979](state court "is not the final authority on the interpretation which a jury could have given the instruction")." *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985). The constitutional question is whether a reasonable juror could have understood the instructions and/or verdict forms to require unanimous finding of mitigating factors before considering a life sentence. As such it is important to address the possible interpretations of the jury instructions, not what the Petitioner-Warden or even this Court think the instructions mean. *Mills v. Maryland*, 486 U.S. at 375-76.

As Petitioner acknowledges. Pet. 16, in *Spisak*, like *Mills*, every instruction given to the jurors advised them that every decision they made had to be unanimous and addressed the jury as the collective "you" rather than individually. Immediately after being told to unanimously determine that death was the proper sentence the jury was instructed that "if you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, you will then proceed to determine which

of the two possible life imprisonment sentences to recommend." (Pet. Apx. I-324a-326a). It must be presumed that the jury would understand the unanimity requirement to apply to every decision since there was never a contrary instruction. *Mills*, 486 U.S. at 378-379. There is simply nothing in the *Spisak* jury instructions or the verdict forms that suggests the unanimity instruction did not apply to every single jury determination, including the existence of mitigating factors or the impact of that evidence. The totality of the jury instructions were such that the reasonable juror could have understood the charges as meaning that a death sentence had to be unanimously rejected before a life sentence could be considered. As in *Mills*, the impact of this instruction is to preclude each individual juror from individually giving effect to the mitigation evidence.

It is possible that the jury properly understood and applied the instructions but it is just as possible that the jury was misled and misapplied the law. Given the high degree of certainty required in capital cases, *see Andres v. United States*, 333 U.S. 740, 752 (1948), there is substantial probability that a juror in this case was prevented from independently considering and giving weight to mitigation evidence as required by *Lockett* and *Eddings*. Therefore, the resulting death sentence is unconstitutional. *Mills*.

3. **There is nothing in *Musladin* or *Landrigan* that is inconsistent with the Sixth Circuit's decision granting relief on Spisak's jury instruction claim.**

Petitioner's argument essentially asserts that the mere fact that the *Mills* jury instructions that were not identical to Spisak's jury instructions, means that Spisak's state court decision was not contrary to or an unreasonable application of clearly established federal law and the Sixth Circuit must be misapplying *Musladin* because this Court has

never addressed the type of claim presented." Pet.14. This argument is the equivalent of saying that habeas relief could be granted under *Strickland* only if the facts of the ineffectiveness claim were identical to those in *Strickland* itself.[2]

In *Musladin*, the Supreme Court noted and contrasted how some factual distinctions reflect categorically distinct legal scenarios. For analytical purposes, defendants forced to wear prison garb and uniformed state troopers sitting immediately behind the defendant reflected a legally distinct category from individual courtroom spectators wearing buttons carrying the likeness of the victim. The Court denied relief under §2254(d)(1) because the former fact patterns spoke to clearly established legal principles about a defendant's right to a fair trial in the context of 'state sponsored courtroom practices," unlike the button-wearing spectators, whose actions clearly had no relation whatsoever to any official state action. As the Court noted, clearly established federal law "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Musladin*, 127 S.Ct. at 653.

But *Musladin* could never be utilized, for example, to reject all factual scenarios under *Strickland* where the fact scenario about counsel's failures was not identical to those detailed in *Strickland*. In considering the applicability of *Musladin*, the Sixth Circuit noted that this Court noted in *Panetti v. Quarterman*, 551 U.S. __, 127 S.Ct. 2842, 2858 (2007)

[2] Of notes is the fact that Petitioner never cites *Musladin* in his arguments on the ineffective assistance of counsel claim.

(quoting *Musladin*, 127 S.Ct. at 656 (Kennedy, J., concurring)), that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" Pet.Apx. B-7a.

As the analysis in section 2 above demonstrates, Petitioner Warden's argument that Spisak's jury instructions must reflect a claim outside 'clearly established law' of *Mills* because they lack identity with *Mills*' instructions, ignores the Circuit's significant and rational analysis of the *Musladin- Panetti* law. Thus, it is significant that the *Mills* Court specifically crafted a holding much like the Court did in *Strickland*: the legal principle established was clearly meant to encompass a myriad of factual situations which might implicate those clearly established legal principles. After making clear that in a capital case the sentencer may not be precluded from considering mitigation and that the issue under consideration was that a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, the *Mills* Court asserted that it's holding was expressing a broad legal principle meant to be applied to the myriad of unique statutory variations and contexts in which capital mitigation is considered throughout the country.

> Under our decisions, *it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, (citations omitted), by the sentencing court, (citations omitted), or by an evidentiary ruling*. (Citations omitted). The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. *Whatever the cause, if petitioner's interpretation of the sentencing process [that a jury that does not unanimously agree on the existence of any mitigating circumstance results in a situation in which the jury or jurors may not give mitigating evidence effect], is correct, the conclusion would necessarily be the same. 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett it is out duty to remand this case for resentencing.*' (Citations omitted)(Emphasis added).

Mills, 486 U.S. at 375.

Petitioner Warden is simply incorrect to premise his request for certiorari on the argument that *Mills* applies 'fairly narrowly to its unusual circumstances.' Pet. 19.[3] This analytical error by Petitioner, which leaves the Warden seeking some non-required identity of language or form between Ohio's 'acquittal first' jury instruction and verdict form and those specific instructions and verdict forms at play in *Mills*, reflects a gross misreading of *Mills* by the Petitioner, not the Sixth Circuit. How Ohio chooses to comply with *Mills* or by what nomenclature the instructions go by is properly left to Ohio. But as the Circuit recognized in its consideration of *Musladin*, "we may find the application of a *principle* of federal law unreasonable despite the "involve[ment of] a set of facts 'different from those of the case in which the principle was announced.'" (Emphasis in original, citations omitted) Pet. Apx. B-7a.

The Sixth Circuit's opinion and the Amended Orders do no more than *Mills* insists upon, and that is to consider whether the instructions and verdict forms, given a reasonable interpretation, might be interpreted to require juror unanimity as to the presence of a mitigating factor. *See Andres v. United States*, 333 U.S. 740, 752 (1948) (cited in *Mills*, 486 U.S. at 377)(noting '[t]hat reasonable men might derive a meaning from the instructions given other than the proper meaning of §567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.")

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[3] In the effort to support this untenable argument Petitioner uses the 'fairly narrowly' reference to *Mills* from *Beard v. Banks*, 542 U.S. 406, 420 (2004). However, Petitioner misrepresents the context from within which the quote was secured. *Beard* rendered the 'fairly narrow' assessment of *Mills* in the context of a *Teague* analysis as to whether the recent *Mills* decision could be applied retroactively. In rejecting the argument this Court considered whether *Mills* fell within the second *Teague* exception as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Beard*, 542 U.S. at 420 ("The *Mills* rule applies fairly narrowly and works no fundamental shift in our understanding of the *bedrock procedural elements*" essential to fundamental fairness.") (Citation omitted). This Court ruled that *Mills* did not fall within *Teague*'s second exception.

Petitioner's failure to understand that *Mills*'s holding was explicitly meant to encompass all the various forms of states' capital statutes encourages other shortcomings and outright misstatements about the nature of this claim. For example, Petitioner argues that the Sixth Circuit's analysis is based largely upon it's own jurisprudence in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which Petitioner admits was anchored in the state case of *Ohio v. Brooks*, 661 N.E.2d 1030 (Ohio 1996). Pet.18. Petitioner then argues erroneously that the Sixth Circuit's interpretation of Spisak's jury instruction "was based solely on Ohio law," Pet. 19, never realizing that the *Brooks* decision, which addressed this same instruction, was specifically based upon and cited to *Mills*. *Brooks*, 661 N.E.2d at 1041.

Nor did the Court err in citing this Court's post-*Mills* opinions or circuit cases. Pet. 18, n.1. The Court's citation to *McCoy v. North Carolina*, 494 U.S. 433 (1990), simply illustrated the *Mills* error.

> Rather, *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence in deciding Issues Three and Four: whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death. Under *Mills*, such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance under Issue Two.

This is the exact analysis engaged in by the Circuit and demonstrates how the state court decision is contrary to and/or an unreasonable application of *Mills*. Therefore, the Petition for a Writ must be denied.

4. There is no conflict between the Circuits.

Petitioner's claim of a circuit conflict, Pet. 20, is simply incorrect. Every case relied upon by Petitioner demonstrates that the Circuits are consistent in applying *Mills*. The Circuits consistently review the instructions as given in light of *Mills* and evaluate whether those instructions violate the constitution because there is a possibility a reasonable juror may have been precluded from giving effect to mitigating evidence because of the unanimity instructions. *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999). *See also Zettlemoyer v. Fulcomer*, 923 F.3d 284, 307-08 (3rd Cir. 1991); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997). Rather than demonstrating a conflict, these cases demonstrate both the diversity of state statutes that *Mills* recognized as a given context for capital jurisprudence, as well as the acknowledged compliance with *Mills* and the individual consideration required by the Constitution and this Court.

Nor is there a conflict within the Sixth Circuit itself. Pet. 21. There are cases that reach different conclusions, that is grant or deny the Writ, on *Mills* issues. However, those cases only demonstrate that the Circuit is properly reviewing the issue under *Mills*. That is, the Court reviews the specific instructions and verdict forms given in individual cases as well as the specific law of each state and determines whether those instructions comply with *Mills*. *See Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998) (reviewing Tennessee jury instructions). In fact, the Circuit clearly rejected the Warden's claim of some intra-circuit conflict. In *Williams v. Anderson*, 460 F.3d 789, 810-13 (6th Cir. 2006), the Court went to great length to explain exactly why there is no conflict.[4]

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[4] The Petitioner specifically cites to *Williams v. Anderson*, as the Circuit Court's acknowledgment of confusion within the Circuit. Pet. 22. But 'confusion' is *not* 'conflict.' *Williams* reconciled these cases in order to alleviate any further confusion and issued an unequivocal statement as to why the so-called 'acquittal first' instructions are, consistent with the Circuit precedent under *Davis*, unconstitutional under *Mills*.

Under the doctrine established in *Mapes*, 171 F.3d at 415, and expanded in *Davis*, 318 F.3d at 689, acquittal first jury instructions are unconstitutional in this Circuit. An acquittal first jury instruction is "any instruction requiring that a jury unanimously reject the death penalty before it can *consider* a life sentence ...." *Davis*, 318 F.3d at 689 (emphasis added); *see also Henderson v. Collins*, 262 F.3d 615, 622 (6th Cir.2001). Acquittal first jury instructions are unconstitutional because they violate the Eighth and Fourteenth Amendments. *Davis*, 318 F.3d at 689; *see also Mapes*, 171 F.3d at 416 (noting that the Ohio Supreme Court found that acquittal first instructions violate the Eighth and Fourteenth Amendments). As the Supreme Court explained in *Mills v. Maryland*, 486 U.S. at 374-75, 108 S.Ct. 1860, the Eighth Amendment, which applies to the states through the Fourteenth Amendment, requires jurors to consider all mitigating evidence. Any instruction which precludes jurors from considering mitigating evidence violates the Eighth Amendment. *Id.* According to *Davis*, acquittal first jury instructions violate the Eighth Amendment because they "preclude[ ] the individual juror from giving effect to mitigating evidence and [thus] run afoul of *Mills*." *Davis*, 318 F.3d at 689 (citing *Mills*, 486 U.S. at 367, 108 S.Ct. 1860).

Williams, 460 F.3d at 810.

In fact, in *Williams*, the Sixth Circuit distinguished the 'acquittal first' instruction and analysis from precisely the argument Petitioner is putting forth to argue that the Circuit erroneously 'expanded' *Mills* to violate *Musladin*.[5] Petitioner argues that "[t]he Sixth Circuit thus failed to recognize the significant distinction between a jury instruction that requires unanimity in *specific mitigation findings* and an instruction that simply requires unanimity in the *ultimate outcome*." Pet.16 (emphasis in original). In *Williams*, the Circuit acknowledged that the 'acquittal first' analysis under *Mills*, (as referenced in footnote 4, *supra*), is a

[5] Petitioner did not seek this Court's review of *Williams* despite the fact that Williams was granted relief on both an ineffective assistance of counsel claim (Williams was represented by the same trial attorney as Spisak), and a *Mills* claim.

separate and distinct argument from the 'unanimity in the ultimate outcome' argument. *Id.*, 460 F.3d at 808.[6]

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[6] Prior to its *Mills* analysis, the *Williams* Court distinguished unanimous outcome arguments from unanimous mitigating factor issues. *Id.*, 460 F.3d at 808 ("Unanimous -life claims must also be distinguished from unanimous -mitigating factor claims. A unanimous life claim is based on a jury instruction stating that a *verdict imposing life* must be unanimous. A unanimous-mitigating factor claim is based on a jury instruction stating that *mitigating factors* must be unanimously found in order to be considered."). The Circuit went on to note that a trial court's instruction to the jury stating that any verdict recommending life would have to be unanimous did not violate the Eighth Amendment as set forth in *Caldwell* because it properly reflected Ohio law. *Id.* While not germane to Spisak's case, it demonstrates that the Circuit completely understands the distinction which serves as a basis for Petitioner's argument that the Circuit has violated *Musladin* by trying to "wedge Spisak's case into the *Mills* paradigm." Pet.16

Contrary to Petitioner Warden's assertion, the Sixth Circuit created no rule that Ohio must give some specific instruction. How Ohio chooses to comply with *Mills* is left to Ohio.[7] The Circuit simply evaluated the instructions actually given in Spisak's case in light of *Mills* and determined that the instructions as given failed to comply with this Court's precedent. Ohio remains free to require unanimous "verdicts" but is must ensure that the unanimity instructions do not apply to mitigating factors or run afoul of the *Mills* principles. If Ohio's instruction in this case had done that, the Circuit would have denied relief.

There is no conflict, either intra-Circuit or between the Circuits. The application of *Mills* to specific cases will naturally result in different outcomes as the instructions and forms used vary from jurisdiction to jurisdiction and even within specific jurisdictions. Rather than demonstrating a conflict, the difference in outcomes demonstrate a straight forward application of *Mills* to the specifics of the individual cases. Therefore, the petition should be denied.

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[7] It should be noted that the Ohio Supreme Court subsequently determined that the "acquittal first" instruction given in this cases violates both Ohio law and *Mills*. *State v. Brooks*, 75 Ohio St. 3d 148, 159-62, 661 N.E.2d 1030, 1040-42 (1996). *See also State v. Diar*, 2008 Ohio 6266, pp. 241-246, ___ N.E.2d ___, ___ (2008), vacating a death sentence for failure to give a single juror instruction and accepting State's concession that such error constitutes reversible error.

5. Conclusion

For the reasons outlined above, the petition for a writ of certiorari should be denied.

B. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to Spisak's Ineffective Assistance of Counsel Claim.

1. The Sixth Circuit Properly Reviewed This Matter Pursuant to AEDPA.

As noted in Section A(1), *supra*, the Circuit did apply AEDPA to this claim. The Ohio Supreme Court's decision gave no analysis or reasoning for any of its rulings in denying Spisak's numerous claims. Rather the Ohio Supreme Court merely grouped issues together and denied them with undifferentiated string-citations. Pet. App. at 306a-309a.

The entire analysis of Spisak's claim was:

> In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one, twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer*, *supra*; *Donnelly v. DeChristoforo* (1974), 416 8 U.S. 637; *Darden v. Wainwright* (1986), 477 U.S. 168; *Strickland v. Washington* (1984), 466 U.S. 668; *Evitts v. Lucey* (1985), 469 U.S. 387; *State v. Smith* (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128; *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *State v. Staten* (1969), 18 Ohio St.2d 13, 47 O.O.2d 82, 247 N.E.2d 293; *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, 23 OBR 295, 491 N.E.2d 1129 (distinguished); *Payton v. New York* (1980), 445 U.S. 573 (distinguished); *Rawlings v. Kentucky* (1980), 448 U.S. 98; *State v. Rogers* (1986), 28 Ohio St.3d 427, 28 OBR 480, 504 N.E.2d 52, paragraph one of the syllabus (*Rogers* II), reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *Buell*, *supra*; *Wainwright v. Witt* (1985), 469 U.S. 412; *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus (*Rogers* I), reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *State v. Williams* (1983), 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323; *State v. Williams* (1986), *supra*; *State v. Byrd* (1987), 32 Ohio St.3d 79, 512 N.E.2d 611; *State v. Kidder* (1987), 32 Ohio St.3d 279, 513 N.E.2d 311; *Illinois v. Allen* (1970), 397 U.S. 337; *State v. White* (1968), 15 Ohio St.2d 146, 44 O.O.2d 132, 239 N.E.2d 65, paragraph two of the syllabus (distinguished); Evid.R. 404(B); *State v. Spikes* (1981), 67 Ohio St.2d 405, 21 O.O.3d 254, 423 N.E.2d 1123; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 24 O.O.3d 316, 436 N.E.2d 1001; *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267; *Maurer*, *supra*, paragraph seven of the syllabus; *State v. Graven* (1977), 52 Ohio St.2d 112, 6 O.O.3d 334, 369 N.E.2d 1205; *State v. Adams* (1980), 62 Ohio St.2d 151, 16 O.O.3d 169, 404 N.E.2d 144; *State v. Thompson*

(1981), 66 Ohio St.2d 496, 20 O.O.3d 411, 422 N.E.2d 855 (distinguished); *State v. Mann* (1985), 19 Ohio St.3d 34, 19 OBR 28, 482 N.E.2d 592; *State v. Ferguson* (1983), 5 Ohio St.3d 160, 5 OBR 380, 450 N.E.2d 265; *Estelle v. Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359; *Steffen, supra*; R.C. 2945.39(D); *Doyle v. Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright v. Greenfield* (1986), 474 U.S. 284 (distinguished); *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583; *Carter v. Kentucky* (1980), 450 U.S. 288 (distinguished); *State v. Price* (1979), 60 Ohio St.2d 136, 14 O.O.3d 379, 398 N.E.2d 772, paragraph four of the syllabus; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1257 (distinguished); *Chapman v. California* (1967), 386 U.S. 18.

. . .

In summary, we find no merit in the propositions of law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme.

Pet. App. at 306a-309a. The ineffective assistance of counsel claim at issue was raised as Proposition of Law No. 57 before the Ohio Supreme Court. It was this opinion that the Sixth Circuit reviewed through the AEDPA lens. As the Circuit Court stated it was applying AEDPA standards, quoted this Court's AEDPA standards, gave the state court decision the requisite deference, and still determined that Spisak was entitled to relief there are no grounds for this Court's review and the Petition should be denied.

2. The Sixth Circuit Properly Reviewed this Matter Under *Strickland v. Washington*, 466 U.S. 668 (1984).

Petitioner acknowledges that the Sixth Circuit identified the proper legal standard *Strickland v. Washington*, 466 U.S. 668 (1984) applicable to this claim but asserts that the Circuit merely "paid lip service to *Strickland*." Petition at 24. Petitioner's argument is nothing more than a disagreement with the conclusions reached by the Sixth Circuit and presents no grounds for this Court's review.

Petitioner attempts to refashion the Circuit Opinion in order to create an issue that simply does not exist. Petitioner asserts that the Circuit Court must have applied *Cronic* in

spite of never citing it because the Court cited a case in which *Cronic* was an issue *Rickman v. Bell*, 131 F.3d 1150, 1156 (6th Cir. 1997). This assertion is wrong for two reasons. First, the Circuit clearly granted relief under *Strickland*, not *Rickman*. The Court determined that Spisak satisfied both the deficient performance and prejudice prongs of *Strickland*

> In light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the "strong presumption" that counsel's actions constituted 'sound trial strategy." *Strickland*, 466 U.S. at 689. Defendant is correct that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has never done a good deed, is not deserving of no (sic) sympathy, and is entitled to no mitigation." (Def.'s Br. at 64.) Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead. Therefore, we reverse the district court's denial of habeas on this claim.
>
> Pet. App. at 66a-67a.

Second, *Rickman* was not used as some sort of code for *Cronic* but simply to demonstrate the nature of the ineffective assistance of counsel. The Court noted that Spisak's counsel, as Rickman's counsel had also done, abandoned his duty of loyalty to his client. Pet. App. at 65a. The duty of loyalty to a client is a duty recognized and addressed not by *Cronic* but by *Strickland*. 466 U.S. at 688. Every citation and analogy to *Rickman* was clearly followed by review of Spisak's claim under *Strickland*. Pet. App. at 65a-66a. That the Sixth Circuit recognizes the difference between a *Strickland* claim and a *Cronic* claim is demonstrated by *Spisak* and *Rickman*. In *Spisak* the Court never cited *Cronic*, specifically refused to presume prejudice, and relied solely on *Strickland*. In *Rickman*, the

Court repeatedly analyzed the claim under *Cronic*, explained why *Cronic*'s presumption of prejudice applied, and did not apply the two-prong *Strickland* test.

On remand the Circuit clearly demonstrated that *Strickland* was the applicable standard by citing only *Strickland* in its analysis. The Court did not even cite *Rickman* demonstrating that Petitioner's argument of subversive application of *Cronic* is frivolous. Contrary to Petitioner's argument, the Circuit Court did not review this case under the presumed prejudice standard of *United States v. Cronic*, 466 U.S. 648 (1984). This is demonstrated by a review of the opinions. The Circuit never cited, let alone relied on *Cronic* in reviewing the claim. Only by imagining that the Circuit Court decided this case on law not cited can Petitioner assert an error. However, just as it is presumed that a court follows the law it cites, it must be presumed that a court does not follow law it does not cite. *See Bell v. Cone*, 543 U.S. at 455-56. The Circuit specifically stated it was reviewing the claim under *Strickland*, identified the two-prong test of *Strickland*, never cited *Cronic*, and did not presume prejudice but specifically stated "we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death." Pet. App. at 67a. Since Petitioner's argument regarding *Cronic* is factually and legally incorrect, the Petition for Certiorari must be denied. The "error" Petitioner asserts simply did not happen.

3. Spisak was Denied his Sixth Amendment Right to the Effective Assistance of Counsel in the Mitigation Phase of his Capital Trial.

Noticeably absent from Petitioner's argument is any quotation of what trial counsel actually said to Spisak's jury. Only by reviewing what counsel actually said can the claim be evaluated and this is exactly what the Sixth Circuit did on its review. A review of the full record reveals that the Sixth Circuit properly understood the entire record, applied AEDPA

and concluded that counsel unreasonably breached a duty of loyalty to his client such that there was a Sixth Amendment violation that prejudiced Spisak and that the Ohio Supreme Court determination was contrary to, or an unreasonable application of *Strickland*.

a. There Is No Evidence in the Record That Trial Counsel Had a Strategy or That the Sixth Circuit Ignored Such a Strategy.

Petitioner asserts that "counsel made a strategic choice to concede certain facts about his client's character, his background, and the brutality of his criminal acts." Pet. at 31. Counsel's argument did not 'concede certain facts' but instead argued that the jury must consider non-statutory aggravating circumstances (which are not permissible under Ohio law) that Spisak was unworthy of sympathy, had no good deeds, and "He is sick, he is twisted. He is demented, and he is never going to be any different." Pet. App. at 339a. There is absolutely no evidence that counsel made a strategic choice. In fact, the Sixth Circuit described sections of counsel's argument as 'rambling incoherently towards the end of the closing argument about integrity in the legal system.' Pet. App. at 65a. It is not sufficient to assume that counsel made a strategic decision, counsel must actually make the strategic decision and for this there is no evidence to support Petitioner's assertion. Furthermore, any strategic decision must still be 'reasonable." *Strickland*, 466 U.S. at 690-91. As the Circuit determined, "Defendant is correct that 'there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has never done a good deed, is not deserving of no (sic) sympathy, and is entitled to no mitigation.'" Pet. App. at 66a-67a.

As the Circuit found, "[m]uch of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." Pet. App. at 66a. There can be

no reasonable defense counsel strategy to make such an argument to a capital jury. The argument told the jury in no uncertain terms that a death sentence was the proper sentence.

b. Arguments by Trial Counsel.

Petitioner ignores that in the mitigation closing argument, trial counsel suggested to the jury that there was no mitigation:

> You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, *and before the prosecution rushes to point out, if any, let me add a coma, and say, if any.* That's probably the first thing you have to find. Let's talk first about the aggravating factors. (Emphasis added)
>
> Pet. App. at 333a.

It is in this context that the analysis of counsel's actions are properly comprehended.

After denigrating the only mitigation evidence he presented, counsel then argued non-statutory aggravating circumstances warranting a death sentence. Under Ohio law only statutory aggravating circumstances can be considered by the jury. R.C. 2929.03, 2929.04. Ohio law is "well settled that the nature and circumstances of the crime may not be weighed against the mitigating factors." *State v. Williams*, 99 Ohio St.3d 493, 515 (2003), *citing* to *State v. Wogenstahl*, 75 Ohio St.3d 344, 356 (1996). The record demonstrates that Sowisak's counsel encouraged jurors to weigh the following 'aggravating circumstances' which were, as a matter of Ohio law, **not** aggravating circumstances.

> a) ... And we can feel that, or see the cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. *Aggravating circumstances*, indeed it is. And, ladies and gentlemen, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will, the urine. You are in the bathroom, and it is death, and you can smell the death. Pet. App. at 334a.

b) ... and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses [worn by Spisak] and looked into the muzzle of a gun that kept spitting out bullets. . . And we all went through the surgery, and we were all kind of with John Hardaway when he came in here and he still got some physical problems, and we can all feel those, and we are not going to forget. Pet. App. at 334a-335a.

c) ... and we all know the terror [of Coletta Dartt], or we can feel that right in the pit of our stomach. Pet. App. at 335a.

d) ... on the 27th of August we were in another lavatory, and we were all there because we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they felt, because ladies and gentlemen we participated, and we were there. Pet. App. at 335a.

e) ... There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky [because they survived]. Lucky, if you have a nightmare that will never go away. That's lucky, it may be, *but its an aggravating circumstance*. Pet. App. at 336a.

Counsel further argued that Nazi Germany, the Holocaust, and Spisak's political views were aggravating circumstances to warrant death.

f) ... And, Ladies and gentlemen, that's what you have got to weigh, the *aggravating circumstances* against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years, or fifty years, you are always going to be another Spisak juror, among other things, because isn't what you heard kind of a microcosm, and some of us, not all of us, are old enough to remember. Isn't what you heard just a microcosm of a twelve year reign of terror that was unparalleled in history, the Third Reich, and it was going to last for a thousand years. Pet. App. at 336a-337a.

g) ... And those clown couldn't buy 12 or 13. Pet. App. at 337a.

h) ... And listen to this sick distorted mind, and you will hear once again kind of a muffled dissent, but those hobnail boots on the cobblestone streets, but ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and

you won't hear the gas in Auschwitz, because ladies and gentlemen, it never made any noise in killing six million. Pet. App. at 337a.

i) *Aggravating circumstances, all the aggravating circumstances you ever want.* Pet. App. at 337a.

The suffering inflicted upon the families of the homicide victims is similarly improper and would not have been admissible if offered as evidence. *State v. Williams*, 99 Ohio St.3d 493 (2003), citing generally *State v. White*, 85 Ohio St.3d 433, 445-446 (1999), nor would a prosecutor's invocation of it in argument have been proper. *Id.*, citing *State v Reynolds*, 80 Ohio St.3d 670, 679 (1998). Counsel went beyond simply discussing the suffering of the victims and their families and actively urged the jury to identify *with the victims* and use that identification as aggravating circumstances.

j) .. [O]n the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never knew what hit him, and we can feel that bullet hitting, and *that's an aggravating circumstance*. Pet. App. at 335a.

k) .. We were with [Spisak] when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies and gentlemen, *would you ever want any more aggravating circumstances*? I don't think that you would. Pet. App. at 336a.

l) ...Turn and look at [Spisak]. And let me suggest to you, and *we are talking about aggravating circumstances*, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, *the aggravating circumstances* that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford. Pet. App. at 338a.

As a final unreasonable act, trial counsel then drew the jury's attention to the victims' families, who were seated in the courtroom, and argued to the jury that their sentencing decision was "awfully important" to them:

> m) ... My God, you've looked in the back of the courtroom, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. Pet. App. at 359a.

Finally, counsel's argument denigrated Spisak to the point of suggesting his future dangerousness, which became a springboard for providing the jurors with reasons to discount any and all mitigation that might be offered on Spisak's behalf:

> n) Now, the Judge has told you about mitigating factors. . . . The Court has told you that, or the Court will tell you that the defense on this portion could bring forward, and bring to you anything that the defense might consider to be mitigating, good deed that a person might have done, an otherwise good life.
>
> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none.
>
> And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.
>
> The question then comes up, ladies and gentlemen, is there any mitigation. Is there any reason for you, ladies and gentlemen, to go back to your jury room, . . . and to do anything other than to recommend to this Judge that at the earliest possible time he be strapped in the chair and electrocuted.
>
> Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves. . . . It is the reason that you get that little bit of a flutter when you hear them play the Star Spangled Banner, because, ladies and gentlemen, we are different. We are a humane society.

Pet. App. at 338a-339a.

Counsel's argument that the *only* mitigation was to be found within the jurors themselves, and that Spisak had no redeeming qualities was objectively unreasonable. The Sixth Circuit correctly analyzed that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming

qualities, will never be rehabilitated, has never done a good deed, is not deserving of sympathy, and is entitled to no mitigation." Pet. App. at 66a-67a.

Such vivid, incendiary and improper oratory violates the principle that

> [T]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. ... That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685. The Circuit was clearly correct in determining that, had this closing argument been made by the prosecutor, it would warrant reversal and also demonstrates that Spisak was deprived of the effective assistance of counsel. And this demonstrates the prejudice visited upon Spisak. Had counsel not urged the jurors to consider non-statutory aggravators (including sympathy and identification with the victims, Nazi Germany's war crimes, and Spisak's political views), told that jurors that the only mitigating factor was that found within the jurors coupled with counsel's disavowment of the only mitigating evidence presented (Spisak's mental illnesses), and instead advocated for a life sentence, argued how Spisak's mental illness warranted a life sentence, and why his life was worth saving, there is a reasonable probability that at least one juror would have voted for a life sentence. As it is, Spisak would have been better served by counsel had counsel said nothing.

4. *Carey v. Musladin*, 127 S.Ct. 649 (2006), and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007), Do Not Affect the Circuit's Analysis or Conclusions.

Finally, this matter was previously before the Court. *Hudson v. Spisak*, 128 S.Ct. 373 (2007). Although this Court remanded the matter to the Sixth Circuit for review in light of *Carey v. Musladin*, 127 S.Ct. 649 (2006) and *Schriro v. Landrigan*, 127 S.Ct. 1933 (2007), Petitioner never cites either of these cases in the ineffective assistance of counsel claim nor makes any argument on how the cases impact the Sixth Circuit's opinion. Petitioner therefore waives any argument that *Musladin* or *Landrigan* warrants further review. That is because it is clear that *Strickland* applies to all aspects of counsel's performance, including closing arguments in mitigation. *Bell v. Cone*, 535 U.S. 685, 701-702 (2002); *Herring v. New York*, 422 U.S. 853, 865 (1975). Even *Yarborough v. Gentry*, a non-capital case cited by Petitioner, acknowledges that "[c]losing arguments should 'sharpen and clarify the issues for resolution by the trier of fact.'" 540 U.S. 1, 6 (2004). Nor is there any evidence that Spisak consented to counsel's argument, hindered counsel's performance, or in any way influenced counsel's performance. Spisak's counsel did not sharpen the issues, did not advocate for a finding that the aggravating circumstance did not outweigh the mitigating factors, or even that a life sentence was the proper and just sentence. As the Circuit found "[m]uch of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." Pet. App. at 66a. The Circuit's opinion did not break new ground or in any other way violate AEDPA standards of review.

For these reasons, the petition for a writ of certiorari on the issue of ineffective assistance of counsel is meritless and should be denied.

C. Conclusion.

For the above stated reasons, Spisak requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decisions and opinions. The Sixth Circuit's decisions create no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor do they provide any other reason to warrant revisiting these well and clearly-established areas of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

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REPLY BRIEF

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(3)

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No. 08-724

In the Supreme Court of the United States

KEVIN SMITH, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

The Sixth Circuit's grant of the habeas writ in this case warranted this Court's remand just last Term, and nothing has changed since then: The Sixth Circuit failed to correct its errors, and Spisak offers nothing in his Brief in Opposition to counter the Warden's case for this Court's review. Spisak's jury instructions differed materially from those in *Mills v. Maryland*, 486 U.S. (1988), and other circuits—indeed, other Sixth Circuit panels—have upheld the same instructions. Meanwhile, the Sixth Circuit ignored half of the inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984)—the requirement that the petitioner show actual prejudice. Even more problematic, the court reached these conclusions despite the deferential rubric of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, 1219.

A. The Sixth Circuit failed to apply clearly established federal law to Spisak's jury-instruction claim, exacerbating a division of authority.

1. The Sixth Circuit failed to apply AEDPA deference.

Contrary to this Court's remand order, the Sixth Circuit failed to observe AEDPA's limitations when considering Spisak's claim for habeas relief under *Mills*. On direct appeal, the Ohio Supreme Court reviewed Spisak's sixty-four propositions of law—including his jury-instruction claim—and found each to be without merit. App. 306a; see also *id.* (rejecting Spisak's *Mills* argument because it had "previously been raised and rejected" in other cases). AEDPA

deference applies to that judgment regardless of whether the Ohio Supreme Court decided the issue "without extended discussion." *Harris v. Stovall*, 212 F.3d 940, 943 n.1 (6th Cir. 2000); see also *DiBenedetto v. Hall*, 272 F.3d 1, 6 (1st Cir. 2001).

To meet the "high standard" that AEDPA erects before "a federal court may issue a writ of habeas corpus to set aside state-court rulings," *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007), the federal court must do more than pay lip service to § 2254(d)(1)—and lip service is all the Sixth Circuit paid here. The Ohio Supreme Court decision at issue was neither "contrary to," nor "an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), because the disputed jury instructions were materially different from the problematic jury instructions in *Mills*. That difference alone required the Sixth Circuit to deny Spisak's request for habeas relief.

2. *Mills* does not apply to jury instructions that require unanimity in the verdict, as opposed to instructions that require unanimity on individual mitigation factors.

The Warden and Spisak agree that the relevant constitutional question is whether a reasonable juror could have understood the jury instruction or verdict forms to require unanimous findings on individual mitigating factors. Opp. at 5. After all, that is what *Mills* was about: The Court held that a sentencing instruction in a capital case is unconstitutional if it leads a reasonable juror to believe that any

mitigating factors not found unanimously must be ignored. 486 U.S. at 384.

What Spisak and the Sixth Circuit's opinion fail to recognize is that the instructions in this case differ markedly from those in *Mills*. The jury instructions and verdict form in *Mills* were unconstitutional because the jurors were first required to make what amounted to unanimous special findings that a *particular* mitigating factor existed before they weighed, in a second stage, the aggravating factors against those mitigating factors. That problematic procedure apparently resulted in the jurors' complete failure to conduct the required weighing process. *Id.* at 380 n.13. As a result, the jurors could reasonably have thought that they needed unanimously to agree on each mitigating factor.

No reasonable juror in this case could have made the same mistake. The jury instructions at Spisak's penalty phase simply required juror unanimity in the ultimate determination—whether the aggravating factors outweighed any mitigating factors. The trial court instructed the jury that if "all twelve members of the jury [found] by proof beyond a reasonable doubt that the aggravating circumstance in each separate count outweigh[ed] the mitigating factors," then it was required to recommend "that a sentence of death be imposed upon the defendant." App. 324a. If the jury found, however, "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] ha[d] been found guilty of committing in the separate counts outweigh[ed] the mitigating factors," then it should impose a life sentence. *Id.* The verdict form

further required juror agreement only as to the overall balance between aggravating and mitigating factors. That requirement is a far cry from mandating uniform agreement on individual mitigating factors. Finally, even assuming Spisak is correct that Ohio law required a different jury instruction, see Opp. at 14 n.7, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

3. Other circuits and other panels of the Sixth Circuit have reached opposite conclusions when evaluating nearly identical jury instructions.

The inter- and intra-circuit conflicts on the application of *Mills* to jury-instruction claims further justify this Court's review. First, the conflicts demonstrate that the Sixth Circuit's holding is not "clearly established" for AEDPA purposes. See *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (lower court divergence reflects "lack of guidance from this Court"). And second, the conflicting rulings show the need for this Court to clarify the reach of *Mills*.

Contrary to Spisak's assertions, the Sixth Circuit's decision that *Mills* prohibits instructions that require unanimity on the ultimate balance of aggravating versus mitigating factors directly conflicts with other circuits' decisions. The Third Circuit, for instance, found that *Mills* does not prohibit the trial court from instructing the jury to impose death "if you unanimously agree . . . that the aggravating circumstance outweighs any mitigating circumstances." *Zettlemoyer v. Belcomer*, 923 F.2d

284, 308 (3d Cir. 1991). Similarly, the Tenth Circuit found that an instruction requiring the jury to "find unanimously that the aggravating circumstances outweigh any mitigating circumstances before imposing the death penalty" did not violate *Mills*. *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); see also *Powell v. Bowersox*, 112 F.3d 966, 970-71 (8th Cir. 1997) (finding no *Mills* violation where jury instructions "deal with balancing mitigating circumstances against aggravating factors"); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (finding no *Mills* violation where instruction required unanimous finding on aggravating factors but no unanimous instruction on mitigating factors); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same). Yet the Sixth Circuit here, considering virtually indistinguishable instructions that required the jury impose death "[i]f all twelve members of the jury find . . . that the aggravating circumstance[s] . . . outweigh[] the mitigating factors," found a *Mills* violation. App. 4a. That decision created a clear conflict among the circuits.

The Sixth Circuit is not alone on the wrong side of that conflict. In *Abu-Jamal v. Horn*, 520 F.3d 272 (3rd Cir. 2008), *petition for cert. filed*, No. 08-652 (U.S. Nov. 14, 2008), the Third Circuit held that a verdict form requiring a unanimous finding that aggravating circumstances outweighed mitigating factors ran afoul of *Mills*. Spisak's case therefore provides this Court with an opportunity to resolve a division with at least four circuits finding no *Mills* problem, and two finding constitutional error with respect to materially indistinguishable instructions.

The division of authority is exacerbated by the Sixth Circuit's inconsistent application of *Mills* to jury instructions similar to those at issue here. Even though both the district court, see App. 189a, and the Sixth Circuit, see, e.g., *Williams v. Anderson*, 460 F.3d 789, 810-13 (2006), have acknowledged an intra-circuit inconsistency, Spisak insists that that "'confusion' is not 'conflict.'" Opp. at 12 n.4. But the varying outcomes are not, as Spisak asserts, attributable to differences between jury instructions, see Opp. at 12; rather, the circuit has considered similar instructions before and arrived at the opposite conclusion. In *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), the Sixth Circuit held that *Mills* did not prohibit an instruction requiring the jury to impose death if they "'unanimously determine[d]'" that the aggravating circumstances were "'not outweighed by any mitigating circumstances,'" *id.* at 337 (quoting instructions), because "language requir[ing] unanimity as to the results of the *weighing* . . . is a far different matter than requiring unanimity as to the *presence* of a mitigating factor," *id.* at 338; see also *Scott v. Mitchell*, 209 F.3d 854, 876-77 (6th Cir. 2000) (following *Coe*).

The courts are inconsistently applying *Mills*, in short, both within and among the circuits, and this Court's guidance is needed.

B. The Sixth Circuit's analysis of Spisak's ineffective assistance claim misapplied *Strickland* and contravened the principles of AEDPA.

1. The Sixth Circuit failed to conduct an inquiry into actual prejudice.

The Warden showed in his Petition that the Sixth Circuit, by focusing on trial counsel's alleged deficiencies to the exclusion of any sort of prejudice inquiry as required by *Strickland*, indulged a presumption of prejudice akin to *United States v. Cronic*, 466 U.S. 648 (1984). For his part, Spisak does not claim any entitlement to a presumption of prejudice, but instead contends that the Sixth Circuit *did* conduct a prejudice inquiry. Spisak's argument finds no support in the Sixth Circuit's opinion.

To establish prejudice under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. At the penalty phase of a capital trial, courts "reweigh the evidence in aggravation against the totality of available mitigating evidence" to determine whether, but for counsel's deficiencies, a reasonable probability exists that the jury would have imposed a life sentence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

The Sixth Circuit never conducted this reweighing. After cataloging the deficiencies in trial counsel's closing argument, the Sixth Circuit offered a one-sentence conclusory statement: "[W]e find that a reasonable probability exists that at least one juror

would have reached a different conclusion about the appropriateness of death . . . .". App. 67a. The court never articulated why, but for the closing, a reasonable probability existed that the jury would have voted for life.

The Sixth Circuit's embrace of *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), confirms the Warden's position. The *Rickman* court found that trial counsel's "performance was so egregious as to amount to the virtual or constructive denial of the assistance of counsel, and thus implicate[d] the *Cronic presumption* of prejudice." *Id.* at 1156. Here, the Sixth Circuit struck an identical chord: "We believe that trial counsel's actions discussed above are so egregious that they are equivalent to those in *Rickman*, and similarly deprived [Spisak] of effective assistance of counsel." App. 66a. And as in *Rickman*, the court here omitted any analysis into *Strickland*'s prejudice prong.

In response, Spisak observes that the Sixth Circuit cited only *Strickland*, not *Cronic*, and asserts that "it must be presumed that a court does not follow law it does not cite." Opp. at 18. But this simplistic statement elevates citation over substance and ignores the Sixth Circuit's actual analysis. The Sixth Circuit omitted any inquiry into prejudice, relying instead on a conclusory statement to complete its *Strickland* analysis. Regardless of the label, this approach expands *Cronic*'s presumption of prejudice.

2. Spisak has not established that the Ohio Supreme Court's decision was contrary to or an unreasonable application of *Strickland*.

Spisak isolates a series of passages from trial counsel's closing argument and asserts that their content establishes ineffective assistance. Opp. at 20-25. His argument is not only inaccurate but also fails to afford proper deference to counsel's judgments, as required by *Strickland*, or to the state court's adjudication of the claim, as required by AEDPA.

a. Spisak has not demonstrated deficient performance.

As to deficient performance, Spisak asserts, falsely, that trial counsel "discount[ed] any and all mitigation that might be offered on Spisak's behalf," suggesting "that the *only* mitigation was to be found within the jurors themselves." Opp. at 23, 24. But counsel unambiguously pressed, in way of mitigation, the theme of Spisak's mental illness, referring expressly to the testimony of his psychological experts. See App. 339a-344a; 353a-354a. His soliloquy on societal values—"we are different," "we are a humane society"—was the vehicle for that theme: "[A]s a people," counsel explained to the jury, "we have instructed our General Assembly to make that inability [to know wrongfulness], that substantial inability a mitigating circumstance." App. 344a.

Spisak also criticizes trial counsel for openly discounting other mitigation leads in his closing—

"redeeming qualities," "good deeds," and "sympathy." Opp. at 24. But this argument simply begs the question whether Spisak had positive traits and anecdotes to present, and whether such items would constitute a compelling mitigation case. The Sixth Circuit itself already answered that question in the negative: "The best chance of mitigation available was in fact the evidence that [Spisak] was, to some degree, mentally ill." App. 69a. Accordingly, counsel cannot be faulted for discarding arguments with little to no chance of success.

Spisak further challenges trial counsel's discussion of the nature and circumstances of the murders in his closing, asserting that counsel improperly "argued non-statutory aggravating circumstances warranting a death sentence," Opp. at 21, but this position, too, is meritless. Under Ohio law, the State must first establish a statutory aggravating factor to demonstrate a defendant's eligibility for the death penalty. See Ohio Rev. Code § 2929.04(A). Given Spisak's uncontested murder spree, his eligibility cannot be disputed. See § 2929.04(A)(5). And once eligibility is established, the jury "shall consider," in part, "the nature and circumstances of the offense" in assessing whether the defendant has presented any mitigating factors favoring a life sentence. § 2929.04(B). Therefore, the nature and circumstances of Spisak's crimes were unquestionably on the minds of the jury at the penalty phase, and subject to comment by both parties. See *State v. Smith*, 721 N.E.2d 93, 114 (Ohio 2000).

More broadly on this point, Spisak ignores the principle that "[j]udicial review of a defense attorney's summation is . . . highly deferential—and doubly deferential when it is conducted through the lens of federal habeas review." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). During the penalty phase, Spisak proudly testified to his involvement in the murders, his hatred of African-Americans and Jews, and his desire to "continue the war." App. 388a-397a. He also performed a "Heil Hitler" salute in front of the jury. See J.A. to 6th Cir. Case No. 03-4034, at 1820. In light of Spisak's hate-filled presentation, trial counsel faced a high degree of difficulty in crafting his closing argument. It was not unreasonable for counsel to show disgust at Spisak's actions before weaving that natural reaction into an argument that Spisak's mental defects mitigated the brutality of his acts. See, e.g., *Yarborough*, 540 U.S. at 10 (quoting Clarence Darrow) ("[Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization.").

b. Spisak has not demonstrated prejudice.

On *Strickland*'s prejudice prong, Spisak repeats the Sixth Circuit's mistake. After cataloging trial counsel's deficiencies, he states "there is a reasonable probability that at least one juror would have voted for a life sentence." Opp. at 25. Spisak offers no analysis of whether counsel's closing argument had an adverse impact on the jury's verdict, nor could he.

First, Spisak improperly magnifies the role of closing argument in the jury's deliberations. The

trial court instructed that closing arguments "are not evidence" for their deliberations, App. 316a, and jurors are presumed to have followed this instruction. See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

Second, Spisak incorrectly suggests that trial counsel's closing argument prejudiced his mitigation case. As the Sixth Circuit noted, however, trial counsel offered at the penalty phase "extensive evidence of Defendant's severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation." App. 69a. He further drew the jury's attention to the subject of mental illness during closing argument. App. 339a-344a. And the trial court instructed the jury that "mental disease or defect" was an appropriate subject for mitigation. App. 323a. Spisak has not shown a reasonable possibility of a different result had counsel presented the mental illness theme more forcefully or effectively.

Third, Spisak fails to recognize that *he* introduced the damaging and inflammatory subjects of which he now complains. While testifying, Spisak volunteered gruesome details of each murder and expressed no remorse. For instance, he indicated that he "accomplished something" in shooting John Hardaway, celebrating the achievement with "a pizza and a couple of Cokes," App. 392a, and that he targeted Brian Warford because "[i]t's best to get them when they're young," App. 396a. Spisak also used the occasion as a soapbox, exclaiming that Hitler was "the greatest man in the last two thousand years of man's history," App. 387a, and

that his own testimony provided "a reasonable logical concise explanation for those things which must be done," App. 393a. Finally, if given the chance, Spisak said he would "escape from jail" and "continue the war [he] started." App. 397a. Even if trial counsel was wrong to repeat these facts at closing argument, there was no prejudice. The facts were already before the jury in their rawest and powerful form—Spisak's own testimony.

Errors by trial counsel violate the Sixth Amendment only where they are "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Given the incontestability of the murders, their heinous nature, Spisak's expressions of pride, and his desire to continue his criminal conduct, any error by counsel at closing argument did not prejudice the overall fairness of the trial. At the very least, the Ohio Supreme Court's rejection of Spisak's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland*.

CONCLUSION

For these reasons, the Court should grant the Petition.

Respectfully submitted,

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January 12, 2008

JOINT APPENDIX

129

(4)

No. 08-724

Supreme Court, U.S.
FILED
MAY 2 2 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

KEITH SMITH, WARDEN,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX – VOLUME I

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CERTIORARI GRANTED FEBRUARY 23, 2009

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RELEVANT DOCKET ENTRIES

Frank G. Spisak, Jr. v. Carl Anderson, Warden
District Court Case No. 95-CV-2675

DOCKET ENTRY NO. 1

NOTICE by petitioner Frank G Spisak Jr. of intention to file H/C pet. (2 pgs) (vd) [Entry date 12/20/95]

DOCKET ENTRY NO. 19

AMENDED PETITION for Writ of Habeas Corpus (2pgs+exh) (rs) [Entry Date 04/10/97]

DOCKET ENTRY NO. 138

Order denying Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254. Further, the court issues a certificate of appealability pursuant to 28 U.S.C. Section 2253(c) and Fed.R.App.P. 22(b) as to the 13 grounds enumerated in the Opinion. JUDGE SOLOMON OLIVER, JR. (R, B) (Entered: 04/18/2003)

DOCKET ENTRY NO. 139

Judgment Entry. This court, having issued its Memorandum of Opinion and Order denying the Petition for Writ of Habeas Corpus, hereby dismisses this action. The court certifies, pursuant to 28 U.S.C. 1915(a)(3), that an appeal from this decision could be taken in good faith as to grounds 1, 2, 4, 5, 6, 7, 10(3), (7), and (8), 11, 12, 23, 26, 31, 32(H), (J), (T), and (Y). The court issues a certificate of appealability pursuant to 28 U.S.C. 2253(c) and Fed.R.App.P. 22(b) as to those grounds only. As to all remaining grounds, the court certifies, pursuant to 28 U.S.C. 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28

U.S.C. 2253(c); Fed.R.App.P. 22(b). (Related Doc 138) JUDGE SOLOMON OLIVER, JR. (R, B) Modified text on 4/21/2003 (M, J A). (Entered: 04/18/2003)

DOCKET ENTRY NO. 147

NOTICE OF APPEAL to the 6th Circuit Court of Appeals filed by Frank G. Spisak, Jr. as to 146 Order on Motion to alter/amend judgment of 7/29/03 and 138 Order and 139 Judgment of 4/18/03. (Rossman, Alan) Modified text on 8/1/2003 (H, S P). (Entered: 07/31/2003)

TESTIMONY OF FRANK G. SPISAK, JR.

* * *

[1298]

DIRECT EXAMINATION

MR. SHAUGHNESSY:

Q. Frank, tell us your full name, spell your last name for the court reporter, if you will?

A. Frank George Spisak, S-p-i-s-a-k, Jr.

Q. All right.

Frank, tell us, if you will, how old you are, what month and what day you were born?

A. 32 years old, born June 6, 1951.

Q. You are the defendant in this case?

A. Yes.

Q. All right.

Tell the ladies and gentlemen of the jury, if you will, where you are presently residing, where you are living?

A. I live in the Cuyahoga County Jail.

Q. All right.

How long have you been in the Cuyahoga County Jail?

A. About nine months.

Q. All right.

Frank, if you remember, tell us what date it was that you were arrested, what date you came to the jail complex?

A. I was arrested on the 6th of September. And [1299] I was brought into the jail on the 9th of September, '82.

Q. Presumably 1982?

A. Yes, that' s right.

Q. Now, prior to that time tell us where did you live?

A. Prior to that time I lived at 1367 East 53rd Street, Cleveland.

Q. Now, you heard the testimony here during the past three weeks about a home on East 53rd Street. Is that the home that was testified to; is that the address that you have just given us?

A. That's correct.

Q. Frank, what kind of home is that, is it a duplex, four family, apartment, what is it?

A. It's a four family wooden structure, two up and two down.

Q. How long did you live there?

A. Eight years.

Q. Did you live upstairs or downstairs?

A. I lived upstairs.

Q. Now, you have told us about your home. You heard testimony about the north side of the house, the south side of the house.

Now, tell us which side you lived on, whether [1300] it was the north or the south side?

A. I lived in Suite 4, and that was on the north side.

Q. And what year did you move there?

A. In 1973.

Q. 1973?

A. Yes.

Q. And did you ever since 1973 until September 6, 1982, did you live anyplace else?

A. No, sir.

Q. Did you rent there, did you have a lease, did you own, what were the arrangements?

A. I rented there.

Q. Tell us what you recall your landlord's name?

A. The landlord at the time of my arrest was Richard Frazier.

Q. And did he live there, did he occupy one of the suites?

A. No, sir, he did not.

Q. An absentee landlord?

A. Yes.

Q. Did you have a lease or did you pay month to month, week to week, what were the arrangements?

A. Month to month payments.

Q. On September 6th, the day you told us you were [1301] arrested, the day you came to the jail

complex, were you working at that time?

A. No, I was not.

Q. Well, immediately preceding that day, when is the last time you worked?

A. Well, my steady employment ended on August 4th.

Q. Would that be 1982?

A. Yes, that's right.

Q. Your steady employment what was your steady employment? In other words, what was your regular trade, profession or whatever, tell us where it was?

A. I am a machinist. I worked at Edward W. Daniel Company and I ran an automatic screw machine.

Q. You said that employment ended on August 4, 1982?

A. Yes.

Q. Tell the ladies and gentlemen, if you will, what happened?

Did you get fired, did you quit the job, did the job run out; tell us what happened.

A. Well, I am sue it's a fairly common thing.

Nowadays with the Reagonomics, the way they are, a lot of people were out of work and that's what happened at my factory, they laid off about twelve [1302] people one day and I was one of them and I had to hit the streets.

Q. Frank, we were talking about your job.

We were talking about the job running out.

How long did you work for the Daniel Company prior to the job running out in August?

A. Well, I would say about two-and-a-half years.

Q. All right.

What – the Daniel Company, you had some initials before that. Tell me that again, it slipped my mind.

A. The full name is Edward W. Daniel.

Q. Edward W. Daniel.

What do they do?

A. They make screw products like turn buckles, U-bolts, eye bolts. You have seen these big things that they use like on the docks, they have a big lock, and they are going to lift something up and put it somewhere. They make those things, marine hardware.

Marine hardware?

A. Right.

Q. You worked there two-and-a-half years, you were a machinist, machine operator, whatever you said that it was, is that a highly skilled, or is that something [1303] that someone with no experience such as myself can do?

A. It's considered highly skilled.

Q. It's considered highly skilled.

What training, what background did you have

to enable you to become a highly skilled machinist?

A. I was an apprentice machinist for approximately seven years before I got that job.

Q. All right.

Other than the Edward W. Daniel Company, which makes marine hardware, where you worked for two-and-a-half years, where else had you worked in your profession as a machinist?

A. Before Daniel Company, I worked for Langenau, L-a-n-g-e-n-a-u, Manufacturing Company on 73rd and Madison.

Q. That's over on the west side?

A. Yes, that's metal things like hinges and locks and things that go on those boxes they put dead people in.

Q. I see.

And you worked there for how long?

A. I worked there for one year.

[1304] Q. All right.

As a machinist at the Langenau Company?

A. Langenau.

Q. Langenau. All right.

You worked there for a year, you worked at Edward W. Daniel for two-and-a-half years.

What other employment background do you have that would be helpful for us to know about?

A. Oh, I worked a lot of other different shops. I worked at Elwell Parker Electric Company. I

worked Lenton Manufacturing, L-e-n-t-o-n, that's on 33rd and Lakeside, and that's where I studied my apprenticeship.

Q. All right.

Why don't we go back then just a few years. Let me ask you if you went to high school?

A. Yes, I went to high school.

Q. All right.

Tell us where you went to high school?

A. I went to Midpark.

Q. Midpark is where?

A. In Middleburg Heights.

Q. In Middleburg Heights, that's a southwest suburb of the City of Cleveland?

A. Right.

[1305] Q. All right.

What year did you graduate, if indeed you did graduate?

A. I graduated in 1969.

Q. All right.

If you know, or if you remember, what place in your class did you graduate academically?

A. I don't remember my place, but I would say I was in the upper 100.

Q. The upper 100, and how many students graduated with you?

A. 500 to a thousand.

Q. 500 to a thousand.

You like school?

A. Yes.

Q. What subjects did you take in high school?

A. I took what was called the college prep, humanities and the fine arts.

Q. College prep, humanities and the –

A. Fine arts.

Q. Fine arts, for the edification of those of us who may not know, what are the fine arts?

A. Music, languages, and I took political science courses.

Q. Political science courses.

[1306] Do you have any favorite subject when you were in high school?

A. History, social sciences and the political sciences.

Q. And the political sciences?

A. Yes.

Q. All right.

Now, after graduation from high school, you told us about college prep.

Did you go on and attend any institutions of higher learning like a college?

A. Yes, I did. I went to Cleveland State?

Q. All right.

What years did you go to Cleveland State?

A. In 1969 and 1970.

Q. As a full time student?

A. Yes, sir.

Q. Would that be day student or night student?

A. Daytime.

Q. You were a daytime student. As a full time student, how many credit hours would you have carried?

A. I don't remember.

Q. Well –

A. It's on my record, I'm sure they have it over there.

[1307] Q. Fine.

Was it a full schedule?

A. Yes, it was a full load.

Q. Now, Cleveland State is the institution, the university, that has been much in the subject of what we are talking about in this case, right?

A. The one and the same.

Q. All right.

You studied there in what month and what year?

A. October, '69.

Q. All right.

And you finished, or didn't go there anymore

after which date?

A. June, 1970.

Q. All right.

Did you complete any particular courses? Obviously, you didn't graduate, but did you get through the course of studies that you had chosen?

A. Yes, I did.

Q. What kind of subjects, what kind of courses did you take at Cleveland State?

A. I took German, European history, political science, English, and there may have been another one in there, but I forget what it is.

[1308] Q. Did you do well with those subjects, did you complete them?

A. Yes, sir, I think I did well in all the subjects.

Q. Fine. What would your – at the time that you completed, did you have a grade average – well, let's back up.

A. I don't remember what it was.

Q. You don't remember what it was?

A. No.

Q. Let's back up a minute.

Is Cleveland State on a point system like 3.0 or 4.0?

A. Yes, I think they are on a point system.

Q. They are on a point system?

A. Yes.

Q. The point system, although you do not now some 12 years later, you do not remember what it was, was it satisfactory?

A. Yes.

Q. Did you like your studies at Cleveland State University?

A. Yes, I did.

Q. You completed all the courses then to your own satisfaction and to the satisfaction of your various [1309] professors?

A. Indeed.

Q. Now, if you liked your studies, if you liked the courses, tell the folks here, if you will, after having taken college prep, why did you cut your college career, what some of us may think, why did you cut it short after that period of time at Cleveland State?

A. Two reasons: A: It was dollars and cents. I couldn't afford to continue my schooling on my own; and B: I was devoting a lot of my time and energy to political activity at that time and I decided to become active in the American Nazi Party local unit here in Cleveland, Ohio.

Q. Is it fair to say that your political philosophies, your desire to become active in the Nazi Party, that then took over your earlier desire to go to school?

A. Right. I still had a desire to go to school but you can't be everywhere all at the same time.

Q. During that period of time, Frank, when you decided not to go to school but to become active as a Nazi, were you employed on a full time basis then?

A. Yes, I was.

[1310] Q. All right.

Let us digress for just a moment and tell the folks here, if you will, were you born in Cleveland, Ohio, Cuyahoga County?

A. I was in born in Cleveland Heights.

Q. You were born in Cleveland Heights?

A. Yes.

Q. As a child where did you live?

A. I lived in the Buckeye Road area.

Q. Any particular street or did you move around perhaps?

A. No. I lived on a street called Honeydale, which is off 116th and Buckeye just near –

Q. Let me guess. St. Margaret's Church?

A. We used to go to St. Margaret's Church every now and then.

Q. You told us that your name is Frank George Spisak, Jr.?

A. Yes.

Q. Presumably then your father is Senior?

A. Right.

Q. Is that right?

A. That's correct.

Q. What's your Mom's name?

A. Irene.

[1311] Q. Tell us a little bit about your Dad, if you will.

Where does your Dad work, if indeed he does work?

A. My Dad is retired right now.

Q. And what was his trade or profession, what did he do before he retired?

A. He did two things. He was a factory worker and he was also a musician.

Q. A musician?

A. Yes.

Q. What instrument did he play?

A. A trumpet?

Q. As a musician was that a professional, professionalism or was it just an avocation?

A. I would consider it professional.

Q. You consider it professional?

A. Yes, sir.

Q. Did he play with any group or groups?

A. Yes, he played with numerous polka bands in Cleveland.

No doubt you're familiar with the TV show Polka Variety.

Q. He was at one time trumpeter on some of the polka shows?

[1312] A. Quite often. Quite often he was.

Q. Does he continue? Is he live and healthy and

well?

A. Yes. Oh, yes.

Q. But he is retired from his factory job, presumably.

Does he continue his work as a musician?

A. Yes, he does.

Q. And he has played the trumpet, or does he have any other instrument?

A. No, just the horn.

Q. Do you have any music ability at all?

A. I just play the record player.

Q. Other than that you don't play the horn or the violin or the piano of anything of that sort?

A. No. They tried to teach me the piano when I was a kid but I didn't have the patience, I guess.

Q. You didn't have the patience, presumably, to learn to play the piano at least in your review, is that right?

A. Well, at least when you are a kid, you need a lot of patience. When you're a kid, you probably don't have the patience then as you do when you're an adult, so I wanted to go outside and play baseball, I didn't want to be sitting in the house.

[1313] Q. Now, Frank, you told us a little bit about your Dad?

A. Yes.

Q. Tell us about your Mom, his wife.

Was she a housewife, employed outside the

house or what?

A. A housewife.

Q. And what was your relationship with your parents, did you get along good, not so good?

A. I don't know.

Q. Well, you told us about a street called Honeydale near St. Margaret's Church off 116th near Buckeye Road?

A. Yes.

Q. How old were you when your family left that street?

A. I think I was about four or five.

Q. Well, let me guess if my memory is correct at that time you would have been almost – your memory would be almost nil if at all, is that right?

A. Well, I only remember bits and pieces.

Q. Do you still have relatives back in that neighborhood?

A. No.

Q. You know that community at this time?

[1314] A. I'm vaguely familiar with it.

Q. In the latter years or in the most recent years you've lived East 53rd Street and you gave us an address of what, 1100?

A. 1300.

Q. A 1300 number?

A. Yes.

Q. That's between St. Clair and Superior, right?

A. That's right.

Q. That's on what we call the northeast side of town, right?

A. Well, I will call it the central city.

Q. The central city?

A. Yes.

Q. Well, if Euclid Avenue were kind of the midline, it's north of Euclid, isn't it?

A. Okay. If that's the way you want it.

Q. Well, if Euclid Avenue were midline, Honeydale or Buckeye Road is south of that, right?

A. Right.

Q. At least for your first few years you lived on the southeast side of town, right?

A. Right.

Q. Now, when your folks moved from Honeydale, did they go right to the southwest suburb or where [1315] did you go?

A. They went southwest. They moved to Parma Heights.

That was just being built up then after World War II because all of the people were moving out of the city.

You had the epidemic called White Flight, and I guess my parents were no exception, they joined in.

Q. Frank, you told us about White Flight and you called it an epidemic.

Is it fair to say your parents left the Buckeye-116th area to go to Parma Heights, is that right?

A. That's right. That's what they did.

Q. You were then four years old. That is now 28 years ago or what?

A. Well, about '56 or '55.

Q. Abut '56?

A. Somewhere in there.

Q. You characterized that as a white flight?

A. Yes.

Q. Tell us what you mean by White Flight?

A. Well, White Flight was a common enough occurrence in the post-war years.

[1316] It didn't just happen in Cleveland, it happened in every city throughout the United States.

Q. What is it?

A. That is where the cities largely before the war, they were white, and ethnic, and during and after the war the black people were coming north from the southern states and they were moving into the neighborhoods that were at one time all white. They were white and ethnic people who lived in the neighborhoods and they didn't want their children going to school with them, so they went to the only place they could go, they went to the suburbs.

Q. Now, in the fifties, that's when your parents moved?

A. About '56.

Q. The Buckeye Road neighborhood, 116th, Honeydale, St. Margaret's Parish in 1956 was not afflicted by those things you have just told us, is that not true?

A. Yes, it was.

Q. It was?

A. Yes.

If I remember correctly, you go down 116th [1317] like towards Kinsman, and that's all black.

Then as you come north, I think it started to be ethnic, but the blacks on the street one by one the blacks were moving closer and closer to Buckeye Road and all the people in that neighborhood, a lot of them were talking about moving to Richmond Heights, Parma Heights or anywhere else just so they didn't have to be living next to those black folks.

Q. Frank, if you will, we have talked about your early childhood.

Now you are in the Buckeye community and you are moving, you place some importance at least from your own testimony as the reason why was white flight?

A. That's right.

Q. Did you share that view?

Well, as a four year old you hardly knew, but in retrospect you agreed with the move your parents made?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Does what you told us, does that concern you, Frank?

MR. NUGENT: Objection.

THE COURT: Sustained.

[1318] Q. Well, in any event, you lived in the Buckeye are, you went to Parma Heights and then you, ultimately you ended up in which suburb?

A. Middleburg Heights.

Q. Middleburg Heights?

A. Yes.

Q. Now, Middleburg Heights is a white middle class community, isn't it?

A. And always has been.

Q. Parma Heights is a white middle class community, isn't it?

A. Always has been.

Q. Buckeye Road in 1956 was certain a white middle class community, wasn't it?

A. It was, and it was even more so before the war.

Q. Fine.

Now, Frank, have you heard or did you hear testimony during the course of this trial that somewhere you told somebody, one of the policeman or somebody about some difficulty at school or being run home or whatever it was, some problem with the black children; you heard that testimony?

A. Yes, I heard that.

Q. You heard that testimony here in this courtroom?

[1319] A. Yes, I heard that.

Q. Frank, did you ever go to school with black people?

A. Not a one.

Q. What?

A. Not a one.

Q. Not a one. All right.

A. So, obviously, the man who told that story was making it up.

All right.

A. Because there were no black folks in Parma Heights.

There were none in Middleburg Heights.

Q. All right.

A. So it couldn't have happened.

Q. All right.

Frank, did you ever tell – was it Detective Harvey Beavers, perhaps – did you ever tell Detective Beavers that these were some of your feelings that because of early childhood encounters with black people, you were anti-black?

Did you ever tell him that?

A. No, I didn't tell him anything like that.

Q. All right.

You told him a lot of things, but you didn't

[1320] tell him that?

A. How could I tell him that if it never happened?

Q. You never had, in the Buckeye community, you never had any communication with black people?

A. I didn't go to school when I lived on Buckeye.

Q. Let me guess, you were only four years old, Mom didn't let you walk down to Kinsman, which was some mile or so away?

A. Yes. She let me go to the corner store on 117th and Honeydale, that was it.

Q. All right.

Did you go to public school when you got to Parma Heights, Parochial School, which was it?

A. Public school.

Q. Public school.

Do you remember what public school you went to, grade school?

A. Oh, yes.

Q. What was the name of that school?

A. The name of the school was Pearl Road Elementary School.

Q. All right.

You do well in school?

A. Oh, yes.

Q. All right.

[1321] Get along with the kids in school?

A. Some.

Q. All right.

About average, you know, everybody doesn't like somebody?

A. I guess so, yes.

Q. All right.

Just an average kid then, right?

A. Yes, I suppose so.

Q. Yes. All right.

In your early years in grade school, were you particularly fond of history and history became a subject that you were exposed to?

A. Well, I didn't pay much attention to it then. The only thing I remember is when I first went to school they used to teach you to raise your right hand like that (indicating) every morning, and say I pledge the allegiance to the flag of the United States of America and to the Republic for which it stands – and after we got done doing that, we used to say a thing called the Lord's Prayer.

Then as I grew up they took both of those things out of school. They took the pledging to the flag out of school and they took the prayers out of school.

Q. Does that bother you, Frank?

[1322] A. Sure.

Q. Why does it bother you that they took the Pledge of Allegiance out of the school curriculum?

A. Well, everybody's supposed to be loyal to their country.

Q. All right.

A. And everybody is supposed to be loyal to God. And anybody who would be against pledging allegiance to the flag, or be against your saying prayers must be either against the country or against God.

Q. All right.

And if you are against the country, you are what?

A. You are a traitor.

Q. All right.

And if you are against God, you are what?

A. You are a devil.

Q. All right.

We can presume then, can't we, Frank, that the people that took the pledge and God out of the schools are both traitors and if there were the same people, both traitors and devils then?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

THE WITNESS: Absolutely.

[1323] THE COURT: Lookit, when there is an objection, stop answering.

THE WITNESS: When –

THE COURT: When there is an objection, stop answering until I rule on the objection.

Put another question to him.

THE WITNESS: Okay.

Q. The fact that you remember this from your early school days, the fact that you mentioned it does this upset you?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, in any event, moving right along, Frank, did you then go to Junior High School after going through grade school at Parma Heights Elementary?

A. Well, I went to Pearl Road Elementary School.

Q. Pearl Road.

A. And then they built a new school closer to my house, see, because Parma Heights at that time didn't have many people in it, but the people kept coming in and coming in and coming in, and the community started to grow, and they had more money, so they needed more schools for the more children that they had, so they built the new school.

[1324] I went there to the new school for two years. Then I moved to Middleburg Heights, J.F. Koeppe, that's K-o-e-p-p-e, I think.

Q. Koeppe?

A. Koeppe, yes.

Q. Who was Mr. Koeppe, if you know?

MR. NUGENT: Objection

THE COURT: Sustained.

Lookit, approach the Bench.

Bring the machine.

(Thereupon, a sidebar discussion was had between Court and counsel on the record out of the hearing of the jury as follows:)

THE COURT: I don't like those faces, and I don't want to embarrass you in front of him, but –

I may be wrong, I may be right, who knows, but don't make faces when I make a ruling, that goes for the entire gang.

MR. SHAUGHNESSY: Here –

THE COURT: Okay.

MR. SHAUGHNESSY: This guy's defense, this guy's defense, of course, is, obviously, insanity.

[1325] A lot of questions – and I don't know, I seen a few objections, and I just, you know, ultimately we are going to have to get into things that –

THE COURT: Who is J.F. Koeppe?

MR. SHAUGHNESSY: Well –

THE COURT: Is this what drove this guy off the blink?

MR. SHAUGHNESSY: Yes. Okay.

No. No. No. I'm wondering about how he feels about things. I just –

THE COURT: Well, his state of mind –

MR. SHAUGHNESSY: Well, you should make up guidelines.

THE COURT: I don't know –

MR. SHAUGHNESSY: Well –

(Thereupon, the following proceedings were had in open court:)

THE COURT: We are going to take a short break. Remember the admonitions.

(Thereupon, a recess was had.)

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(Thereupon, a discussion was had [1326] in the Court's Chambers off the record.)

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THE COURT: You may be seated.

You may continue, Mr. Shaughnessy.

MR. SHAUGHNESSY: Thank you, sir.

DIRECT EXAMINATION (Continued)

BY MR. SHAUGHNESSY:

Q. Frank, when we broke here some few minutes ago, we were talking about your junior high and on to your high school.

You went through the public school system, the entire way, is that my understanding?

A. Yes, that's right.

Q. You were telling us about the new school, there came a time when you went to junior high, was that in Middleburg Heights or Parma Heights?

A. It was in Brookpark and Middleburg Heights.

Q. Presumably then at some point your family

lived in Brookpark?

A. No, I never lived in Brookpark.

Q. All right.

You went to school there in any event?

A. That's right. At that time Middleburg Heights did not have a junior high school.

[1327] Q. Is it safe to say then you went to junior high school in Brookpark and then on to high school at Midpark?

A. Yes.

Q. Did you like high school?

A. Sure I liked it.

Q. At least particularly during high school?

A. Yeah.

Q. Did you take any extra-curricular activities while you were in high school?

A. I was in the Chess Club.

Q. The Chess Club?

A. Yes.

Q. Do you have some proficiency in the art of playing chess?

A. A little bit.

Q. Do you still play chess?

A. Yes.

Q. In recent years?

A. Sure.

Q. You have the equipment to do that?

A. Well, not now.

Q. Well, now you are in jail.

A. Right.

Q. Did you have the equipment at your home, a [1328] chess board there?

A. Yes.

Q. The chess men and the chess board?

A. The wooden one with the felt on the bottom.

Q. Wooden chess men with felt on the bottom. All right.

You play chess a lot?

A. It's hard to find a partner. Nobody knows the game anymore except Bobby Fisher.

Q. Frank, there came a time in your life when you got married, right?

A. Yeah.

Q. Tell the ladies and gentlemen here, if you will, when you were married and to whom you were married?

A. I got married October 27, 1973.

Q. And your wife's name?

A. Laverne.

Q. Laverne?

A. Yes.

Q. Did she have any children?

A. Yes.

Q. How many children?

A. One.

Q. How old is the child?

[1329] A. 9 or 10 years old.

Q. A girl or a boy?

A. A girl.

Q. Tell the ladies and gentlemen, Frank, your daughter's name?

A. Sally Ann.

Q. And the last time you saw her, the last time you saw her was when?

A. Father's Day.

Q. This past Father's Day?

A. Right.

Q. She came to visit you?

A. Her and her mother both did.

Q. All right.

Now, Frank, you were married in 1973?

A. Yeah.

Q. Did there come a time when that marriage ended?

A. Yeah.

Q. When was that?

A. 1978.

Q. And did that end by divorce or how did it end?

A. It ended by divorce.

Q. Did you file for the divorce or did your wife Laverne file for the divorce?

A. She filed it.

[1330] Q. Did you oppose the divorce?

A. I don't remember.

Q. In 1978 were you working?

A. I don't think I was working.

Q. Do you remember the grounds for the divorce?

A. No.

Q. Did there come a time after that divorce in 1978 when you and Laverne both got back together again?

A. Yes.

Q. When was that?

A. 1980

Q. 1980 did there come a time then when you once against became married?

A. Yes.

Q. And where did you get married?

A. In church.

Q. What church was that?

A. St. Vitas.

Q. That's on the east side, isn't it?

A. Yes.

Q. That's a Catholic church?

A. Yes, Roman Catholic.

Q. Roman Catholic Church?

A. Right.

[1331] Q. That was 1980 you were remarried then to Laverne?

A. Yes.

Q. And where were you living at that time, Frank?

A. On East 53rd.

Q. The same house we have been talking about?

A. Yes.

Q. Suite No. 4. on the north side of the building?

A. Right.

Q. Your daughter lived with you there?

A. When?

Q. 1980.

A. After we got married she did.

Q. She did?

A. Sure.

Q. There was a period there when you were separated?

A. Yes.

Q. And when was that?

A. Well, '78 to '80 I lived alone?

Q. You lived alone?

A. Yes.

Q. Now, you were remarried to Laverne in '80?

A. Yes.

[1332] Q. Did there come a time when that marriage ended?

A. Yeah.

Q. When did that happen?

A. About four months later.

Q. Four months later your wife and child lived with you in 1980 and that was only for four months?

A. Yes. From March to July.

Q. March to July?

A. Right.

Q. Presumably then you were once again living alone?

A. After July, yeah.

Q. Who filed for divorce, who got the divorce, if in in fact that ended in divorce?

A. Yeah.

Q. Who filed for divorce, you or Laverne?

A. Laverne.

Q. Do you remember the grounds for the divorce?

A. Nope. There were no grounds.

Q. There were no grounds?

A. None.

Q. Was the divorce ever granted?

A. By whom?

Q. By the court whenever it was filed?

[1333] A. Oh, yes,

The Court did.

Q. But there were no grounds?

A. No.

Q. From that day or that month it was in 1980, did you live with your wife and your daughter again, did they ever come back?

A. They visited me.

Q. But they didn't come back to stay?

A. Nope.

Q. Do you remember the name of the young lady who testified as one of the first State's witnesses who lived across the Hall, you remember her name was Sharon – what was her last name?

A. McConaha.

Q. McConaha?

A. Yes.

Q. Sharon told us that she lived across the hall. She told us at least in passing about your wife leaving; do you recall that testimony?

A. Yeah, I remember that.

Q. When your wife left, did that upset you?

A. Sure.

Q. Were you upset for a long time after that?

A. Sure.

[1334] Q. Why were you upset, Frank?

A. Who wouldn't be?

Q. There were no grounds for that?

A. None.

Q. Now, in 1980 you were working at the Edward W. Daniel Company, right?

A. Right.

Q. Even after the separation, after your wife left you, you continued to support your wife and daughter?

A. Yes, I did.

Q. Now, tell us about your home there on East 51st Street, is it?

A. 53rd.

Q. East 53rd between Superior and St. Clair.

First of all, I suppose you should tell us how many rooms you have, the living quarters.

A. There's a living room, dining room, kitchen, bedroom. There's two bedrooms, closet, a kitchenette and a bathroom.

Q. I'm sorry. I didn't hear the end.

A. Well, a living room, two bedrooms, one closet, kitchenette and a bathroom. And an attic upstairs

and a half basement downstairs.

There's no driveway, no garage.

[1335] Q. A very small apartment?

A. Yeah, pretty small.

You see, the house used to be, I think, you know, they divided it up.

You know how they subdivide them so they could get more money for the building, you know. So they made it into more apartments.

Q. But anyway, you had a living room, you said a kitchenette?

A. Yeah.

Q. There were kitchen facilities, stove, ice box?

A. No. I didn't have that but it was room that you could have fixed it up for a real small kitchen.

Q. When your wife lived there, was she able to cook and prepare meals for you?

A. She had all that. She had the refrigerator, the stove, and all that, but when she left, she took it with her.

Q. She took the refrigerator and stove with her?

A. Right.

Q. And when she left, she took the stove and refrigerator you had to eat out after that?

A. Had to.

Q. You didn't have facilities then from 1980 until you went to jail in September of '82, you didn't have [1336] facilities to prepare meals at home?

A. Well, I had a hot plate and coffee pot.

Q. Did that upset you?

A. Yes, a little bit.

Q. Frank, you told us that you left college, you left Cleveland State University back in 1981 because there wasn't enough time to pursue your activities in the Nazi Party and because of the pressures of work, right?

A. Sure.

Q. Tell us again where you were working at that time?

A. Well, I was working at Kay's Book Store, *K-a-y-'-s.*

Q. And where is Kay's Book Store located?

A. Downtown on Sixth and Prospect.

Q. Sixth and Prospect?

A. Yes.

Q. Kay's Book Store, is that a popular place, perhaps fiction and all kinds of books?

A. Well, it's all kinds of books, text books, books of all sorts. It's every kind of book in the world, any kind you want to imagine, you know. It's like the Cleveland Public Library. It's a big place.

[1337] Q. What was your job at Kay's Book Store?

A. My job was like a clerk. I worked in the stock room.

Q. All right.

A. Take all the stuff coming in and put it on the

shelves and when somebody wanted something, find it.

Q. In other words, you performed every task from stocking the shelves to stock boy, to waiting on customers, clerical?

A. Correct.

Q. All right.

Have a pretty good knowledge of books?

A. Yes, I did.

Q. All right.

You read a lot?

A. Yes.

Q. All right.

A. That's why I got these thick glasses. It wore my eyes out.

Q. You wore your eyes out.

When did you do that, Frank?

A. When I was a kid.

Q. You read a lot when you were a kid?

A. Sure.

[1338] Q. You still read a lot?

A. Yes.

Q. All right.

Let's digress for a moment. You told us that in 1971 then you were working, working at Kay's Book Store, and you had an interest in pursuing

activities with the American Nazi Party, and you then discontinued your schooling.

What got you interested in the American Nazi Party?

A. Well, I read a lot of books about Hitler when I was in school.

Q. High school?

A. Junior high.

Q. All right.

A. Senior high, college.

Q. Why did you read a lot of books about Hitler?

A. I was interested in him.

Q. All right.

A. I wanted to know the truth.

Q. And you say you wanted to know the truth about what, Frank?

A. About the man and about that period of history in which he lived.

Q. All right.

[1339] Based on your reading, did you learn what you perceived to be the truth?

A. Yes, I did.

Q. All right.

Incidentally, what is the truth as you perceive it?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. When did you first join the American Nazi Party?

A. In 1970.

Q. In 1970, which city, or where was it that you joined the American Nazi Party?

A. They had headquarters in Arlington, Virginia ever since 1959 when they were first founded by Commander George Lincoln Rockwell.

Q. All right.

A. And in that year the people of the City of Cleveland decided to open a local one on Clark Avenue, I mean Lorain Avenue.

Q. Lorain Avenue, about what cross street, for those of us who may not remember?

A. Right around St. Ignatius, 99th and Lorain.

Q. Near the West Boulevard area?

A. Right.

[1340] Q. All right. That was in 1959?

A. That's right.

Q. All right. Did you in fact then at that time become a member of the American Nazi Party?

A. Yes, I would say I was a member.

Q. All right.

What did you have to do to become a member of the American Nazi Party?

A. Just join it.

Q. Well, how did you do that? Did you go –

A. They had a little paper.

Q. Did you go someplace? Did you do something?

A. Fill out a piece of paper and you send in a couple of bucks every month.

Q. Did you go --

A. You get a neat little card you put in your wallet.

Q. A neat little card.

What does the neat little card say?

A. I forget what it says, but it's got a Swastika on it. It's red, white and black.

Q. Red, white and black.

Are those colors relevant to anything?

A. Sure.

Q. What are those colors relevant to?

[1341] A. The flag that Adolf Hitler designed.

Q. The flag that Adolf Hitler designed. All right.

Your card was red, white and black, it had a swastika on it, and was neat and you put it in your wallet?

A. Right.

Q. To become a member of the Nazi party, did you have to go someplace to this headquarters, perhaps?

A. It helped if you hung around there, you know, and contributed to the work.

Q. All right.

When you say to the work, did you hang around there and do some work?

A. Sure.

Q. What kind of work did you do, Frank?

A. Well, when they first opened the place, it was called a book store.

Q. All right.

A. Which was kind of misleading, because they didn't have many books in there.

Q. All right.

A. Because they didn't have much money, but I did the same thing there I did at Kay's, when people come [1342] in, they want to find something, I helped them find it.

Q. And that was books, presumably, unlike Kay's Books, that had something to do with the American Nazi Party?

A. Right.

Q. All right.

Did they have regular meetings there?

A. No, they didn't have regular meetings, but they had this tape recorded telephone message. You call a phone number and there is a tape recording that gives little messages for about one or two minutes. You listen to it like a weather report, it tells you what's going on, that kind of thing.

Q. Would that be the American Nazi activities?

A. No, just what's going on in the world.

Q. I see.

A. Yes.

Q. Kind of a minute or two then summation of news then. All right.

To become a member of the American Nazi Party, did you have to take an oath?

A. At one point in time, I did, yes.

Q. What oath did you take?

A. I took an oath of loyalty to the Commander of [1343] the movement.

Q. And who is the Commander of the movement?

A. Matt Koehl.

Q. And how do you spell that last name?

A. K-o-e-h-l.

Q. All right.

Who is Matt Koehl? You told us he is the Commander, but where did he live, what does he do?

A. Sure.

When Commander Rockwell was martyred in 1968 in Arlington, there was nobody to take over the party except for Matt Koehl, who was the designated successor. So he assumed the position of leadership.

Q. All right.

And there came a time then in 1970 when you took an oath to do what?

A. Well, you take an oath of loyalty to the

Commander, but the spiritual leader of the movement is and always will be Adolf Hitler.

Q. All right.

A. You've got to realize that.

Q. What does the oath entail? What does one say when one takes the oath?

A. I don't remember the exact words, but basically what you are doing when you take the oath is you are [1344] declaring war on the society that exists today.

Q. And you are talking about the society where, in Cleveland, in this country?

A. All over the world.

Q. All over the world.

Were you in favor – did you voluntarily take that oath?

A. Yes, I did.

Q. Why did you do that?

A. Because the one world system today is totally opposed to everything that I believe and stand for.

Q. All right.

Now, Frank, let's digress from this. Let me ask you, you told us about your apartment, you had two bedrooms, a living room, a kitchen, which after Laverne left had no ice box or stove.

What kind of things did you have in your apartment?

A. Furniture, stereo.

Q. All right.

A lot of tapes for the stereo?

A. Sure.

Q. What kind of tapes did you have in the apartment?

A. All kinds, music, speeches.

[1345] Q. All right.

Speeches by whom, Frank?

A. Everything, Hitler, George Lincoln Rockwell.

Q. All right.

A. Different people like that.

Q. You answered the question by saying you had speeches of Hitler, those were in German, weren't they?

A. Sure.

Q. You speak, read or understand German?

A. Yes, a little bit.

Q. A little bit.

Could you understand those tapes?

A. Yes.

Q. All right.

Are any of those tapes translated into English?

A. One of them is a tape of a BBC broadcast. I think it was in 1940, or '41. And there is a BBC commentator that was given a translator right along,

you can hear the Fuehrer in the background.

Q. You say the Fuehrer?

A. Yes.

Q. Of whom are you speaking?

A. Adolf Hitler.

Q. Adolf Hitler is the Fuehrer.

[1346] What does Fuehrer mean in English?

A. It means leader.

Q. It means leader. All right.

And after taking the oath, did you consider Adolf Hitler to be your Fuehrer, or your leader?

A. Sure.

Q. All right.

Do you consider today that Adolf Hitler is your leader?

A. Definitely.

Q. Spiritual?

A. Definitely.

Q. Now, in taking the loyalty oath that you told us about, could you, at the same time, could you at the same time pledge the allegiance to the flag that you told us about at an earlier time, that's also a loyalty?

A. That's right.

Q. Are the two consistent, or inconsistent?

A. No, they are not inconsistent, because the

American Constitution represents, as it was set up, no longer exists. The Constitution has been superseded by the Charter of the United Nations, and that's why the pledge of allegiance was removed from the schools.

[1347] Q. All right.

You feel perfectly at ease then today pledging allegiance to the flag of the United States, but at the same time telling us that your spiritual leader, at least, spiritual, is Adolf Hitler?

A. Adolf Hitler stood for an idea, almost the exact same idea that our founding fathers had, but the United States is no longer run by the principles of the founding fathers. It is run according to the dictates of the one world leaders.

Q. And who are the one world leaders, Frank?

A. The Jews.

Q. All right.

And does that upset you?

A. Yes.

Q. Does it upset you to the point where you would kill?

A. Yes.

Q. All right.

Let's talk about a gentleman by the name of Reverend Rickerson. Do you know who I'm talking about?

A. Yes.

Q. All right.

Do you know who killed Reverend Rickerson?

A. Yes.

[1348] Q. Who killed Reverend Rickerson?

A. I did.

Q. Why did you kill Revered Rickerson?

A. I had good reason.

Q. All right.

What was the good reason, Frank?

A. It was something he did.

Q. All right.

Now, Reverend Rickerson was killed on the 1st day of February, 1982; isn't that right?

A. I think so.

Q. Were you a member of the American Nazi Party on that day?

A. The American Nazi Party in that name no longer existed since the day that Commander Rockwell was shot.

Q. I see.

And that was in Arlington in 1968, '67, you told us?

A. All that remains are remnants and splinter groups of his particular movement.

Q. Are you a member of the splinter group?

A. Yes.

Q. Were you a member of the splinter group back in February of 1982?

[1349] A. Yes.

Q. What's the name of the splinter group?

A. There were several.

Q. Well, what are names of the splinter groups then in which, Frank, in which you were attached?

A. The National Socialist Party of America, the American Socialist White People's Party and the Social Networking Aryan People's Party.

Q. Now, the word Aryan means what?

A. White.

Q. To get into the Party, the Aryan Party, the White People's Party, did you have to take an oath?

A. No, not a format oath.

Q. Not a formal oath.

How did you become, or how does one become a member of the three splinter groups that you told us you belonged to?

A. All one has to do is align oneself, declare oneself to be in agreement with what those groups stand for.

Q. Are you in agreement with what those groups stand for?

A. Yes.

[1350] Q. Is what those groups stand for, is that in disagreement with what you believe most people in American stand for?

A. No, I wouldn't say it is in disagreement with what most people stand for. I would say it is in disagreement with what the leaders are telling the people, what the people are being programmed into believing.

Q. You say people are programmed, who are they being performed by?

A. The masses are being programmed by the news media, people who control all the thoughts, public opinion.

Q. And who are those people?

A. Jews.

Q. Exclusively Jews?

A. Almost exclusively, yes.

Q. Almost exclusively?

A. Yes.

Q. Does that upset you?

A. Yeah, sure.

Q. How are people being programmed?

A. When they watch TV, listen to the radio, read the newspaper, go to the movies, buy a book.

[1351] That's all propaganda.

Q. And propaganda urging what or programming people to do what or be what?

A. Getting them to believe what the one world system wants them to accept as the facts and the truth.

Q. And what is that?

A. Many different things.

One, that the races are equal, there is no difference between black and white.

Q Is that true?

A. Of course not. There's plenty of differences.

Q. The difference is obvious, isn't it, white and black?

A. That's one.

Q. You find some other differences?

A. Sure.

Q. What other differences do you find?

A. Intellectual, physiological difference, just like in school.

The guys that got the best grades were the ones that performed the best.

You look at history, the history speaks for itself.

The white people have always created and [1352] maintained civilization. The black people have not done anything, and today they are breeding, breeding at a rate that will soon make the white people extinct.

Q. Does that upset you?

A. Yeah. We're talking about our survival.

Q. Did you ever decide to do something about that?

A. Yes.

Q. What did you decide to do about that?

A. Decide to take up arms against them.

Q. You used the expression declaring war some few minutes ago.

Tell us what you meant when you joined the American Nazi Party, what did you mean, Frank, by declaring war?

A. The state of war has existed between the system and between those of us who believe as I believe ever since 1933.

Q. What happened in 1933?

A. In 1933 a lot of lives were liberated, the first branch of the white people from the yoke of servitude, they were suffering under the regime of the Chancellor of the German nation.

Q. And what was the name of the political party?

A. The National Socialist German Workers Party.

[1353] Q. What was the name of the party that you said something about the yoke of, whatever it was, what was the name of that party that had been in power?

A. Well, I don't recall the exact name of the party, but I know what they stood for.

Q. All right.

What happened particularly in 1933?

How did the transgression come about from this yoke of tyranny or whatever to the liberated Hitler party that you told us about?

A. The German people are tired of living under slavery. They wanted freedom, so they supported a man who gave them what they wanted and he was freely and duly elected to power.

Q. And you agree with that?

A. Sure. That's how this country came into existence.

We didn't want to be under British rules, so we got together and we had a revolution, the same thing they did over there.

Q. And you agree then with the revolution?

A. There is nothing unAmerican about it.

Q. Is there anything that Hitler did that you don't agree with?

[1354] A. Well, maybe a few small things I don't agree with.

Q. Can you think of one?

A. No.

Q. You started to tell us about -- you made a decision somewhere along the way to take up arms?

A. Yes.

Q. What do you mean by that?

A. Take up arms means just what it says, take up arms.

Q. Now, Frank, you sat next to me for some three weeks. You have seen a number of rifles and a number of handguns, a number of firearms, shotguns, whatever, BB guns, whatever, brought

into this courtroom?

A. Sure.

Q. Is that what you mean by arms?

A. Yes.

Q. And when did you start buying guns?

A. 1981

Q. 1981?

A. Yes.

Q. Back in 1970 you joined the White People's Party, the American Nazi Party, did you own guns then?

[1355] Q. You didn't own guns then until 1980?

A. 1981.

Q. '81, excuse me, please.

During that ten or eleven years were you a Nazi during that time?

A. Yeah.

Q. What did you do during that 10 or 11 years to help the movement?

A. Made a lot of speeches, carried signs, stood on street corners, passed out literatures.

Q. And what did that do? Did that do you any good to your way of thinking?

A. No.

Q. What happened, Frank?

A. Well, the people would throw eggs at you,

paint at you, call you names and punch you in the nose and beat you up.

Q. Why do you suppose they did that, Frank?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. You said when you would make the speeches, when you would carry signs, that would not be accepted, the people you were hoping to influence wouldn't be influenced, is that right?

A. Sure.

[1356] Q. The people weren't receptive to the message you were trying to convey?

A. They were displaying their intolerance.

Q. They were displaying their intolerance?

A. Sure.

Q. All right. You found that speech making and sign carrying wasn't successful then?

A. Yes, counter-productive.

Q. By speech making and carrying signs, standing on street corners, being pelted by eggs and getting abused, you were trying to do what?

A. Enlighten the people, wake them up.

Q. Enlighten the people?

A. Sure.

Q. The people didn't want to be enlightened, did they?

A. I guess not.

Q. Did that upset you?

A. Sure.

Q. Did you make a decision after that then to take up arms?

A. At a later point, yeah.

Q. What caused you to make the decision to take up arms?

A. The last resort.

[1357] Q. What are the other presumably -- if one exercises the last resort, what has exhausted the first resort or the second or the third, what other things did you do that were unsuccessful that led you then to the last resort to take up arms?

A. I thought we already went over that.

Q. Other than the speech making, the standing on the street corners, did you do anything else?

A. Like what?

Q. Frank, you are going to have to tell me.

Did you do anything to enlighten people?

A. I thought we already went over that.

Q. Other than the speech making, the standing on the streets corners, did you do anything else?

A. Like what?

Q. Frank, you are going to have to tell me.

Did you do anything to enlighten the people?

A. I thought I did all I could do.

Q. You thought you did all you could do?

A. Sure.

Q. During that time did you continue to do any reading, any studying about the Fuehrer?

A. Sure.

Q. Do you know a lot about the Fuehrer?

[1358] A. Yeah.

Q. You know a lot about the Nazi Party?

A. Yeah.

Q. Do you know a lot about the American parties, Republicans, Democrats?

A. Sure.

Q. The Democratic Party?

A. I know about Abraham Lincoln.

Q. Do you agree with Abraham Lincoln?

MR. NUGENT: Objection.

THE COURT: Sustained.

A. I know Abraham Lincoln and me have a lot in common --

THE COURT: Just a minute. Wait until he puts a question to you.

Put another question.

Q. You told us that the taking up of arms was the last resort?

A. Yeah.

Q. When you started taking up arms, what did you first do, Frank?

A. The first step is you have to have the arms to take up. I have to have the arms to take up arms.

Q. What did you do?

A. Bought some.

[1359] Q. And what did you buy first?

A. Pistols.

Q. Pistol?

A. Yes.

Q. What kind of pistol?

A. .38-caliber.

Q. .38 revolver?

A. Revolver.

Q Five or six shot?

A. Five.

Q. Five shot revolver?

A. Yes.

Q. Did you learn how to use that?

A. I didn't like it.

Q. You didn't like it?

A. No.

Q. Do you know today, do you know a lot about guns?

A. No, not a lot. Not a lot.

Q. Have you studied some things about guns?

A. Yeah.

Q. How much have you studied about guns?

A. A little bit.

Q. Well, what do you know about a .38-caliber, for instance?

[1360] A. What do you want to know?

Q. Well, it will kill people, won't it?

A. Sure. Anything will kill people.

Q. Why did you buy the .38-caliber?

A. It's a tool.

Q. It's a tool to do what, Frank?

A. Shoot people.

Q. As a last resort, then, you bought some arms and you did this in 1981, you bought the .38 and you didn't like the .38-caliber?

A. No.

Q. Did you ever target fire it?

A. Yeah.

Q. Was it in an armory or out in the hill, how did you do that?

A. A number of places. Out in the back yard.

Q. The back yard at 53rd Street?

A. Yes.

Q. Did anybody complain about that?

A. No.

Q. You were target shooting?

A. Well, a lot of people in the neighborhood shoot their guns off.

I used to hear it all the time before I bought mine.

[1361] I used to lay in bed at night and hear shooting all night long.

Q. Did you become, by your target shooting, wherever you might do it, did you become somewhat proficient; were you able to hit the target?

A. Yeah, yeah.

Q. Are you a pretty good shot, Frank?

A. I guess so.

Q. You mentioned before that you damaged your eyes by reading, and you mentioned the heavy glasses.

A. Yeah.

Q. Does that hinder you at all in becoming a good marksman?

A. No.

Q. You see well and you are a good marksman then?

A. Did you ever see the movie Star Wars?

Q. Well, Frank, you are gong to have to answer the question.

Are you a good marksman?

A. Yeah.

Q. Now, you would like to mention some proficiency that perhaps ranks with something that

might have happened in Star Wars, is that correct?

A. Yeah.

In Star War when Luke Skywalker was first [1362] looking to become a Jedi, he was practicing with the light saber and he couldn't hit it for nothing in the world and then Obi Wan Kanobi told him, he said, don't concentrate so much in trying to hit something, just throw your weight through it and the force will do it for you.

That's the same thing when I was shooting. I tried to concentrate on hitting the target and I couldn't hit it, but when I just let the force do it for me, I did it every time.

Q. So you had the force do it for you, the force of the gun powder, the force of the projectile, some inner force of what, can you explain what you mean little bit better?

A. The force of God.

Q. The force of God?

A. With God all things are possible.

Q. With God all things are possible?

A. Even a blind man can hit a target if he is helped by God.

Q. A blind man, if he has the help of God, he can hit a target?

A. Definitely.

Q. Frank, do you believe in God?

A. Yes.

[1363] Q. One God or a number of Gods?

A. One.

Q. One God?

A. Yes.

Q. How do you rate Adolf Hitler and God at the same time, do you compare them at all?

A. Sure.

Q. And what is your comparison, what is the comparison in your mind?

A. I think Adolf Hitler was like Jesus Christ.

He was the greatest man in the last two thousand years of man's history and he couldn't have done the things he did unless God was helping him to do them.

Q. You say Adolf Hitler then, you see Adolf Hitler then as being, your philosophy is Adolf Hitler is an agent of God?

A. Definitely.

Q. You predicate that on the argument that he could not have done the things he did unless he had some divine intervention?

A. Definitely.

Q. What is your relationship with God?

A. We have a good relationship. It's personal.

Q. It's a personal relationship?

[1364] A. Yes.

Q. Can you tell us about it?

A. No.

Q. You told us about Adolf Hitler getting some help from God, about the inner force, the blind man being able to hit the target.

Have you ever felt that you were an instrument of God or you were getting assistance, divine assistance?

A. Sure.

Q. And when do you feel that, Frank?

How long have you felt that?

A. A long time ago.

Q. Did you feel this on February 1st, 1982?

A. Yes.

Q. You had taken up arms on that day, hadn't you?

A. I did.

Q. Were you a loyal member of the Nazi Party or the White People's Party on that date?

A. Well, I don't know about loyal, but yeah.

Q. You certainly weren't ever disloyal to the cause expounded by the National Socialist Party or the Hitler splinter groups, were you?

A. No.

Q. The fact that the groups became splintered, [1365] did that upset you?

A. Yeah, a little bit.

Q. Would it upset you if you thought some of the

groups were disloyal to the Fuehrer?

A. Maybe.

Q. On February 1st, 1982, at least in your own mind, you were loyal?

A. Sure.

Q. And your relationship with God that day, did you feel as if you were an agent of God on that day?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Did you ever tell anybody about this agency with God?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Did you talk to the police at all about this case?

A. When?

Q. September 6th, September 7th, September 8th?

A. Yeah, sure. I talked to them.

Q. What did you tell the police about God?

A. I don't remember what I told them, but we talked.

[1366] Q. The things that you have telling us about the inner force, did you tell any of that to the police?

A. I don't remember.

Q. The things you were feeling, your allegiance,

the things that upset you, the things that pleased you, were they pretty much the same on February 1st, 1982 as they are today?

A. Sure.

Q. Why did you kill Reverend Rickerson?

A. He was bothering me.

Q. How did he bother you?

A. He was making obscene lewd gestures at me.

He was trying to get me to do something with him. He wasn't leaving me alone.

Q. Now, you told us a few minutes ago, Frank, you told us a few minutes ago that it upset you because black people were breeding, you remember that?

A. Yeah.

Q. Do you remember Harvey Beavers testifying the other day?

A. Yes.

Q. You remember Harvey Beavers telling us that you told him when you talked on September 6th or the 7th that you were going to do something about that, [1367] that you were going to shoot the black males, do you remember that?

You remember Harvey Beavers saying that?

A. I don't remember if I told him that, but it sounds pretty good.

Q. It sounds pretty good?

A. Yes.

Q. How do you mean that, Frank?

A. It sounds like that would take care of the problem.

Q. What problem is that, Frank?

A. The over-breeding problem.

Q. What would the over-breeding problem as you see it, what is that going to lead to?

A. That is going to lead to the extinction of the white race if it keeps up.

Q. How would that happen?

A. Because when the black people take over, they are going to kill all the white people. They are doing it all the time.

Q. They are doing it all the time?

A. Sure.

Q. So you decided to do something about that, right?

A. Well, you always hear in the newspaper about [1368] elderly white people are getting beat up and robbed and raped in their own homes. You can't walk on the street in safety. The young white women are being bushwhacked, gunned down, being raped and beaten up in the doorways, the street ain't safe to walk anymore.

Q. And that upsets you, doesn't it?

A. Yes. The blacks are still a minority, no matter what they do.

Look what they did in Africa where they are a

majority? As soon as they get control, they slaughtered all the white people and they do it all the time.

Q. So you decided you were going to do something about it, then?

A. Yes. Why wait for them to come and get you? It's too late then.

Q. What did you decide you were going to do about that?

A. Get as many of them as I could before they get me.

Q. How many of them did you want to get?

A. Well, as many as I could get before I got caught, one thousand, a million, the more the better.

THE REPORTER: Excuse me?

[1369] THE WITNESS: The more the better.

Q. Is it fair to say you hate black people, Frank?

A. Hate doesn't enter into. Emotion doesn't have anything to do with it.

Q. What does enter into it?

A. Survival. We are fighting for our existence. We are fighting for our existence.

Q. When you say "we," what do you mean?

A. As a species. As a species in the animal kingdom, we as a species are fighting for our existence and if we don't preserve our species, we're going to be wiped out like the dinosaurs ended up, like the dodo bird.

Q. What happened to the dodo birds?

A. Not too many of them around anymore, is there?

Q. In any event, you were going to do something about it?

A. Sure.

Q. All right.

Is that why you bought the guns?

A. Sure. When the Indians were losing their battles, what did they do, they fought back, didn't they?

[1370] Q. All right.

A. They lost, but a lot of them went down fighting.

Q. All right.

Now, when you bought the guns, when you went into the gun store and said that you wanted a gun, why did you do that?

A. I got to arm myself.

Q. Why do you have to arm yourself?

A. For the race war.

Q. All right.

Is there a race war now, Frank?

A. Sure.

Q. And whose?

A. A lot of people don't realize it, but there is one.

Q. And who is fighting whom?

A. The non-white people in the world are fighting against the white elite minority.

Q. Are you a member of the white elite minority?

A. I certainly hope so.

Q. All right.

You said when you were carrying signs, or when you were making speeches, that people threw eggs at you and wanted to beat you up. All right.

[1371] A. Sure.

Q. Were those black people that wanted to beat you up?

A. Some.

Q. Sometimes?

A. Some not.

Q. Most of the time were they not white people that wanted to beat you up?

A. Yes, sometimes a lot of times, sure.

Q. All right.

They weren't by any chance Jewish people, were they?

A. I couldn't tell offhand.

Q. You couldn't tell?

A. It happened so fast, you know, you see a car coming by and all of a sudden somebody throws a gallon of pain on you, you don't have a chance to see very much, you know.

Q. All right.

And that upset you, didn't it?

A. It was messy.

Q. You were trying to enlighten the masses, and they wouldn't be enlightened, and it was messy?

A. Sure.

Q. That upset you, you decided you were going to [1372] do something about that, too, right?

How many guns did you buy altogether?

A. Oh, about six.

Q. About six.

A lot more than six guns have been brought in here. Are those not all yours?

A. Most are mine.

Q. Most are yours?

A. A few are not.

Q. A few are not.

Of the few that aren't yours, are they rifles, or pistols, or shotguns?

A. There's one rifle, one shotgun and one pistol that's not mine.

Q. All right.

A. The rest are mine.

Q. All right.

In your home, there on 53rd Street, you told us about the Fuehrer and the music.

Do you have any pictures on your wall?

A. Not too many.

Q. The pictures that you had on the wall, what kind of pictures were they?

A. I had one of my wife and kid.

Q. All right.

[1373] Did you have any pictures of the Fuehrer?

A. Yes.

Q. And a big picture, a little picture, a medium size picture?

A. 8 x 10.

Q. 8 x 10.

What room did you have that in?

A. Living room.

Q. In the living room. All right.

That was signed, or identified in any way?

A. I had it in a gold frame.

Q. You had it in a gold frame.

Prominently in the living room?

A. Put it on top the stereo speaker.

Q. All right.

Your wife Laverne, you loved your wife, right?

A. You what?

Q. You loved your wife Laverne?

A. Yes.

Q. Adolf Hitler, do you love Adolf Hitler?

A. Yes.

Q. What kind of a love is that?

A. Like son loves his father.

Q. Do you think of the Fuehrer as being a father?

A. Sure.

[1374] Q. Do you think of the Fuehrer in a tender, or more benevolent terms than you do on your own father?

A. No, I can't say that, no.

Q. All right.

If there's a love relationship in your mind with Adolf Hitler, tell the ladies and gentlemen what Adolf Hitler has done for you? What have you gained from the reading and the listening and the association, the immersion in the Nazi Party, what has that done for you?

A. It has given me enlightenment and spiritual strength.

Q. Enlightenment and spiritual strength?

A. Yes.

Q. All right.

Is your relationship with Adolf Hitler somewhat akin of love, your reverence for Adolf Hitler? Is that somewhat akin for your reverence for God?

A. Sure.

Q. Because you view Adolf Hitler as an agent of God?

A. He was a disciple and high priest of the highest order.

Q. Of the highest order. All right.

On February 1, 1982, on that day you had taken [1375] up arms, right?

A. Yes, I did.

Q. You decided you were going to do something about the black breeding, right?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. You had taken up arms, right?

A. You mean what I did?

Q. Well, had you already decided to take up arms on that day?

A. I hadn't decided on it beforehand.

Q. Well, you went into the gun store at some time in 1981 and you bought a gun, right?

A. Sure.

Q. And you bought a gun to kill people, right?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Why did you buy the gun, Frank?

A. I bought it for protection.

Q. For protection?

A. Sure.

Q. All right.

And did you practice with the gun?

A. I fired it a few times just to see if it worked, but, I mean, I didn't go to the shooting range [1376] or anything with it.

Q. But you didn't like that first gun, the .38, right?

A. No, I didn't like it.

Q. Did you by some other guns?

A. Yes.

Q. By February of 1982, you many guns did you own?

A. Three.

Q. Three. What were those guns?

A. I had a semi-automatic rifle.

Q. What's a semi-automatic rifle?

A. It's a rifle that has a multi-shot capability.

Q. How many shots?

A. 18.

Q. And what do you have to do to keep those shots coming?

A. Pull the trigger.

Q. Fast as you can pull the trigger, the shots will come out?

A. Right.

Q. All right.

That gun capable of killing someone?

A. Sure.

Q. Why did you buy that gun?

[1377] A. It's a good gun.

Q. No, why did you buy it?

A. I might have a need for it one day.

Q. And what was that need going to be?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. What other guns did you own in February of 1982?

A. Semi-automatic pistol and a derringer.

Q. All right.

The derringer, is that the derringer that we have seen in here, the two shot .38 derringer?

A. Yes.

Q. Over and under?

A. Right.

Q. How about the semi-automatic pistol, what kind of a pistol is that?

A. It's an Erma pistol.

Q. Erma?

A. It's like a Walther PPK.

Q. What is a Walther PPK?

A. I would say it is the most famous handgun in modern time, very reliable.

Q. Where was that handgun developed, if you know?

A. Germany.

[1378] Q. In Germany.

When was it developed?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Your training in the Nazi Party, is that where you learned about that gun?

MR. NUGENT: Objection to the form, Judge.

THE COURT: Overruled. Go ahead.

THE WITNESS: Can I answer that?

THE COURT: You can answer when I say overruled, you can answer.

THE WITNESS: No, I learned that on my own.

Q. All right.

Is that the gun that was brought in cut in half?

A. That one and the similar one.

We saw another one just like it.

Q. No. The one you had in February of '82, is that the one that we have here somewhere that's kind of cut in half?

A. Yes.

You have seen the book, the book, the Life and Death of Adolf Hitler, and that's Exhibit 173, [1379] that's your book, isn't it?

A. (Witness nods.)

Q. All right.

Who cut the pages out of the inside of the book?

A. I did.

Q. All right.

Why did you do that, Frank?

A. So I could put the gun in there.

Q. All right.

Why did you want to put the gun in there?

A. Good hiding place.

Q. All right.

Why did you need a good hiding place for the gun?

A. Well, see, sometimes you go to work and while you are gone, people will go into your house to steal things.

Q. What kind of people go into your house?

A. Crooks, people who need money to buy dope, or something, they will break in your house, you know. And I had that happen a couple of times, and I didn't want them getting my guns.

Q. All right.

A. So I had a lot of books on the shelves. And [1380] they never, you know, a crook never looks in a book, because they are not interested in reading, so I figured if I cut the inside of the book out, I could put the gun in the book and slip it on the shelf with the other books.

It would be the last place they would look, so I kept it in the house.

Q. Is that why you cut the pages out?

A. And if somebody broke in the house, while you were sleeping, all you got to do is take the book off the shelf and you've got protection.

Q. You have got protection in the book?

A. Look in the book.

Q. Look in the book. All right.

You had the book with you on February 1, 1982?

A. No, the book wasn't cut up then.

Q. Oh, when did you cut the book up?

A. In August.

Q. In August of 1982?

A. Right.

Q. All right.

You go to Cleveland State University on February 1, 1982?

A. Yes.

Q. All right.

[1381] And what were you thinking about on that day?

MR. NUGENT: Objection, Judge. What day are we talking about?

Q. I'm sorry.

February 1, 1982, you got up in the morning, put your clothes on, you shaved, had breakfast, and you went to Cleveland State University.

Why did you do that?

A. Well, I had a hangover, I didn't want to go to work that day.

Q. All right.

What day of the week was it?

A. Monday.

Q. You remember it pretty well?

A. A little bit.

Q. How did you feel that morning?

A. Lousy.

Q. Because of the hangover?

A. I had domestic problems.

Q. All right.

And when did you decide to go to Cleveland State University that day, or the day before?

A. No, that morning I called in sick. You know, we had sick days. You can call in sick and still get [1382] paid for coming to work, but you didn't have to go to work. You know what a sick day is.

Q. Sure.

A. So after I called in sick, I kind of moped around the house for a while, then I decided to go down there and go to the library.

Q. All right.

Took your gun with you, did you?

A. Sure, because couple of times I went down there, I stayed all day long, and I didn't get out of the library until ten o'clock at night. And I'd been walking home down the side streets and I'd get mugged. One time a car pulled up and five guys jumped out and they almost killed me.

So I said I'm not going to walk on them streets without a gun anymore.

Q. All right.

A. So I put the gun in my pocket and I went down there. I figured I might be there all day.

Q. You might stay there all day?

A. Sure. Maybe late, you know, dark by the time I get out.

Q. What were you going to do at the library?

A. Read books.

[1383] Q. Read what kind of books?

Did you have anything in mind?

A. Read something about war, the history, you know.

Q. That war you told us earlier?

A. They got a lot of good books.

Q. You told us earlier there was a war right now?

A. Sure.

Q. All right.

A. Sure.

Q. And same thing about in February of 1982, we were at war then according to your view, weren't we?

A. Sure.

Q. All right.

You were aware of that that morning, weren't you?

A. About what, the war?

Q. Being a war?

A. Sure.

Q. The only reason that you carried the gun was to protect yourself in case you got jumped or mugged?

A. Sure. You might get ambushed.

Q. All right.

[1384]Now, Frank, you told us that you made a decision to, you weren't enlightening the people by the carrying of the posters, the black card, they were egging you, when you spoke, they weren't be enlightened, you decided as a last resort to take up arms.

A. Wait a minute.

Q. On February 1, 1982, was that the first time you took up arms?

A. I would say, you know, intellectually, I could see it coming down to that, eventually, it would have to, because there is no stopping them short of that.

Q. No stopping who short of that?

No stopping who?

A. The non-whites.

Q. The non-whites.

Were you concerned about that problem in your own mind that morning?

A. Everybody should be.

Q. All right.

A. If they got any sense.

Q. Were you, Frank Spisak, on February the 1st, 1982, were you concerned with that over-breeding of the black people?

[1385] A. Sure.

Q. And you had a hangover that morning and you had that concern then, right?

A. It had nothing to do with being hung over.

Q. It had nothing to do with being hung over. But you just went to Cleveland State University to read some books about war?

A. It's relaxing.

Q. Relaxing. All right.

Tell us what happened when you got to Cleveland State University?

A. Went in the library for awhile.

Q. What time did you get there?

A. About nine or ten o'clock in the morning.

Q. Nine or ten o'clock in the morning.

What time did you call work and tell them you were going to take a sick day?

A. Eight o'clock.

Q. Eight o'clock.

So a little while later then you went over to Cleveland State to read about war, right?

And you took your gun along in case you got mugged, right?

A. Sure.

Q. All right.

[1386] Had you ever shot that gun at anybody before that day?

A. No.

Q. All right.

Now, you went to the – you say you went to the library and you spent some time in the library.

What did you do in the library?

A. Picked up a few books and, you know, sat down and went through them.

Q. What kind of books, Frank?

A. I don't remember the title.

Q. What were they about?

A. About the National Socialist Movement,

Germany, Third Reich, World War II.

Q. Are there books in the Cleveland State University library that would espouse the philosophy that you have, that you believe in?

A. Not too many?

Q. They don't keep those kind of books then, do they?

A. Every now and then they will get a little – a little gem would come in.

Q. What is a little gem, Frank?

A. Well, they had one called, I think they had one called, Germany Today.

[1387] Q. Germany Today, and that was a little gem?

A. It was a reprint of an old book, 1936.

Q. All right.

A. Different essays originally published in English in Berlin that explained their own point of view, which was going on in their country.

Q. All right.

A. And I don't know how in the heck in the world it ended up on their library shelf, but it was there.

Q. And you considered that to be a little gem?

A. Sure.

Q. All right.

A. Because it gives you information that is contrary to what you usually read like, for example, in William Scheier's book.

THE COURT: Okay. Approach the Bench for a second.

(Thereupon a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

THE COURT: Okay.

Ladies and gentlemen, we are going to take a recess right now for about ten minutes. We are going to work until about [1388] 5:30, quarter of six. So if you want to call anybody, you can come up here and use the phone.

So remember the admonitions. We will see you in about ten minutes I hope.

(Thereupon, a recess was had.)

THE COURT: You may be seated. Mr. Shaughnessy, you may continue.

MR. SHAUGHNESSY: Thank you, Judge.

[1389] BY MR. SHAUGHNESSY:

Q. In any event, Frank, just before we had our break you told us on February the 1st you called in sick and sometime around 9:00 or 9:30, whatever time it was you had gone to the library at Cleveland State University?

A. Yes.

Q. And we digressed from there for a moment and you were talking about a little gem which was an English language 1936 book, right?

A. Right.

Q. Did you read that book that day, Frank?

A. Sure, I looked at it.

Q. Who wrote that book?

A. I don't remember who wrote it.

Q. All right. Some of the problems you have told us about, the blacks, was there reference to that in that book?

A. Well, not specifically but the book dealt with problems of population and the birth rate, things like that.

Q. Way back in 1936, nearly 47 years ago a German author then was concerned about over population?

A. Sure.

Q. How much time did you spend reading that morning?

[1390] A. A couple of hours.

Q. Did reading that book, did that reinforce any of your philosophies that you have told us about?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Did you like that book?

A. Sure.

Q. Did you read the whole book or did you leave it, did you leave some yet to be read?

A. Yes. I left it there and went to the men's room.

Q. Where is the library?

A. It's in the Rhodes Tower.

Q. What floor is it on?

A. The first.

Q. Now, you read for a couple of hours and you liked the book, but you left the book to go to the men's room?

A. Right.

Q. You got in the men's room and what happened?

A. I saw this black man.

Q. What did you think when you saw the black man?

A. I didn't pay no attention to him until he exposed himself at me and started making lewd and [1391] obscene gestures.

He wouldn't leave me alone. He approached me about having some sex with him right there in the men's rest room.

Q. Did that upset you?

A. Sure.

Q. Why did that upset you?

A. It just did. It grabbed me right to the core.

Q. It what?

A. It grabbed me right to the core of my being.

Q. It grabbed you to the core of your being?

A. Yes.

Q. How did you feel?

A. Well, I don't remember exactly how I felt but it ended up with me shooting him.

Q. Were you mad? Were you mad when you were grabbed to the core of your being, were you mad, were you disgusted, were you unhappy; what were you?

A. It was just something I couldn't avoid doing at that particular time.

It seemed to me like fate had brought the two of us together.

I didn't know what was in store for me that day when I went down there. I didn't know what was going to happen, but once it happened, it just happened.

[1392] Q. All right. At some point in time after you got dressed that morning, you made a decision to put the gun in your pocket, right; is that right?

A. I made no such decision. That was an automatic reflection that I did every morning when I got dressed.

Q. You had been carrying the gun for some time then?

A. Sure.

Q. Had you been carrying the gun ever since you bought it?

A. Every since the day I bought it I carried with to work.

When I got to work, I took it out of my jacket pocket and put it in my tool box and I locked it in my tool box.

During the time I was in the factory, when it was time to go home I would unlock the tool box, put the gun back in my pocket and I went home. When I got home, I took it out and I put it where I put it in the house until had to leave the house again.

You see, I never leave the house without it.

Q. So you did it --

A. It's like going outside naked.

Q. You wouldn't do that, would you?

[1393] A. No. I don't think so.

Q. So that morning you didn't make any conscious decision to take the gun from wherever it was and put it in your pocket, you just did it as a matter of course?

A. Well, you have to understand that getting dressed is like a ritual.

You get up, you put on your shoes, your socks, your pants, your shirt. You put your wallet in your pocket and all of those things you normally would carry. You just do it, and you put them with you, you just carry them with you. That's part of routine every day. It's part of the routine.

Q. All right, Frank --

A. It's nothing out of the ordinary.

Q. Frank, when you were in the men's room you said something about fate.

A. Fate, right.

Q. What was it about fate that you felt you were in the men's room and you see this black man, you

said almost as if fate had brought you together?

A. I believe that today, definitely.

Q. Did you feel there was some divine intervention that brought you and Reverend Rickerson together?

A. Yep. I believe it now.

[1394] Q. Why do you believe it now, Frank?

A. Because when I got home and I saw on TV the news that night about this man being shot in the rest room and that he was a Reverend. I had no way of knowing he was a Reverend. He didn't advertise that to me. He didn't say, "I'm a Reverend," or anything like that. He wasn't wearing a clerical garb.

It seemed to me, it seemed strange that this man would be a Reverend and he would be in a place like that trying to solicit somebody for something like that, and he is a Reverend, a student of the Bible and should have known that was a sin; and God punished that with death.

Q. God punishes what with death?

A. Homosexuality. It's in the Bible, it's in the Old Testament.

Q. Is it fair to say those who engage in homosexuality should be punished with death?

A. It's in the Bible.

Q. Where is it in the Bible?

A. The Old Testament.

Q. What does the Bible say about that?

A. The Bible has a whole lot of things that are mentioned.

[1395] Q. What does the Bible say?

What can you tell us the Bible says about death is the result of homosexual activity?

A. It says God will punish those who engage in that with death, that's what it says.

Q. It says you will be punished with death?

A. Yes.

Q. When you got home and you heard this on TV, what did you feel then?

Is that when you first began to feel somehow fate had brought you together?

A. Well, it reinforced the belief in my mind, yes.

Q. In looking back at that day you felt kind of an agent of God that day, you were an agent of God?

A. I believe that God works through human agents and human instruments.

I do believe it and I also believe if the man had not approached me as he did that day he might still be around.

Q. When you decided to take up arms, you told us that you were going to take up arms to stop the over breeding, over population; you weren't doing that that day, were you?

A. No, but once this incident happened I realized that I had picked up a cross, that I would have to go [1396] all the way with it to the bitter end.

Q. Was Revered Rickerson the first?

A. Yes, he was the first one.

Q. When you say that you picked up the cross, who shouldered you with the cross?

A. God.

Q. You felt that God shouldered you with the cross?

A. Every man has a cross. Every man has a cross that he must bear in this life.

Q. And what was your particular cross after Reverend Rickerson died?

A. My cross is to testify to those things which I know to be the truth and if necessary to give my life in the service of that for which I believe.

Q. Now, what do you believe you would give your life for?

A. I would give my life for the survival of my people and my race.

Q. And your people are the Aryan people?

A. Right.

Q. All right. You are in the men's room and the black man said something to you and you did what?

A. I shot him.

Q. How many times did you shoot him?

A. More than once.

[1397] Q. A lot of times?

A. Yeah.

Q. When you first took out the gun, when you made that decision to take the gun out of your pocket did you intend to shoot him?

A. I don't know. I can't remember, you know. I can't remember every little tiny detail.

Q. How did you feel when you feel when you took the gun out of your pocket, did you feel powerful, did you feel like an agent, did you feel that phenomena –

MR. NUGENT: Objection.

THE COURT: The objection is sustained.

Q. You told us a little while ago even a blind man could hit the target if God was guiding his hand or words to that effect.

A. Sure.

Q. Did you feel like that that day?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. How did you feel, Frank?

You now have got your hand in your pocket, how did you feel?

A. Well there was a hole in the wall and I couldn't see the whole man. I could only see, the [1398] part that I could see was his abdomen, the abdomen region which was exposed.

Q. Did you ever see that hole in the wall before, Frankie?

A. Yeah, but never anyone on the other side.

This guy was on the other side of that hole,

and as I said, he was exposing himself and making these lewd obscene gestures at me while I was sitting on the commode.

Q. If you could only see the abdomen area why --

A. I couldn't see his face or anything, but I just aimed right through the part that was sticking through the hole.

Q. How did you feel when you put your hand in your pocket and you pulled out the gun, how did you feel at that time?

A. I don't know. I don't know how I felt.

Q. He was in one stall and you were in another stall, right?

A. Sure.

Q. Your stall was closer to the door or further away from the stall that he was in?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. Closer to the door.

[1399] Q. You were closer to the door?

A. Yes.

Q. When you got the gun in your hand and you started shooting how did you feel then?

A. I don't know.

Q. Well, what happened after you started shooting?

A. Pretty soon I stopped and then I went out the door. I left him there.

Q. Did you see him on the floor after you shot him?

A. No. It happened pretty quick. It was just a matter of seconds I would say.

Q. You didn't turn around to look and see what you had done?

A. No.

Q. When you went out the door, did you put the gun back in your pocket?

A. No.

Q. What did you do with the gun?

A. Had it in my hand.

Q. When you went out the door, how did you feel?

A. When I went out the door, I went up a stairwell to the second or third floor.

When I got upstairs, I was in the hallway where the students were walking.

[1400] Q. How did you feel then?

A. I felt okay.

Q. You felt okay?

A. Yes.

Q. What did you do after that, did you go back to the library?

A. No.

Q. What did you do?

A. I went for a cup of coffee.

Q. Where did you get the coffee?

A. In the snack bar in the University Center.

Q. So you sat down and you had a cup of coffee?

A. Yes.

Q. What were you thinking about?

A. Thinking about what happened.

Q. How did you feel about it then?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I felt okay.

Q. You just felt okay?

A. I felt pretty good.

Q. Why did you feel pretty good?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I felt like I might have accomplished something

[1401] meaningful, something good.

Q. You said something good?

A. Yes.

Q. Why would it be good to kill a man?

A. It was not my decision. It was something that I did.

Q. Whose decision was it, Frank?

A. Well, we know ultimately God has the power of life and death and if it wasn't his will the man should die, the man wouldn't have died no matter how many times I shot him, he could have still lived.

Q. So you felt there was some divine intervention?

A. Of course.

Q. Now, you got home and what did you do?

A. I watched the news.

Q. Why did you watch the news, Frank?

A. Just curious to see if they would, you know, mention anything about it

Q. Now, in February did they mention something about it?

A. Quite a bit.

Q. How did you feel when you watched the news?

A. I couldn't believe it because they said on the news nobody saw nothing and nobody heard nothing.

Q. Did you feel pretty good then?

[1402] A. I felt the protective hand of God must

have been with me because nobody saw me and nobody heard nothing.

It was like God making my invisible and God stuffing the ears of everybody.

Q. God stuffed everybody's ears?

A. He had to because nobody heard a shot, nobody saw no one, nobody remembered anything.

It was just like I was invisible, like I wasn't even there.

Q. All right. So that reinforced your belief in divine intervention?

A. Yes, it had to.

Q. How did you feel about that?

A. I felt pretty good about that.

Q. And when you say pretty good, what did you do?

A. What do you mean what did I do?

Q. Well, you are feeling pretty good. How did you exhibit that feeling?

A. I went to work the next day like normal, you know, like usual.

Q. What did you do that night, the night of February the 1st, 1982?

Did you celebrate, or did you stay home?

A. We had a small party at my house.

[1403] Q. You had a small party. And who came to your house?

A. Some friend's of my girlfriend's, they came over.

Q. Some of your girlfriend's?

A. Her friends, her friends, they were her friends.

Q. Your girlfriend living there at the time?

A. Yes.

Q. And your girlfriend's name?

A. Alice Davis.

Q. Alice Davis.

You heard testimony about the girlfriend that was in your apartment in September of 1982. That's not the same girl?

A. No, a different one.

Q. All right.

The last name is Davis?

A. D-a-v-i-s.

Q. Miss Davis.

What color is Miss Davis?

A. White.

Q. All right.

Did you tell Miss Davis about what happened?

A. Sure, I told her. I told her what happened. She didn't believe me.

[1404] Q. What did she think about that?

MR. NUGENT: Objection

MR. SHAUGHNESSY: Withdraw the question.

THE COURT: Sustained.

Q. All right.

You had a little party, you say, in celebration?

A. Not because of that. I mean her friends were coming over anyway.

Q. And was she living there at the time?

A. Yes.

Q. Had she been there the morning when you got up and put the gun in your pocket?

A. No. She had to take her son to school, or someplace, to the doctor, I forget.

Q. All right. Her son?

A. She was gone most of the day.

Q. Her son was living with you?

A. Yes, six year old boy.

Q. But anyway, you went home and you saw it on television and you told Miss Davis and she didn't believe you and then you had kind of a little party that night and the next day you went to work, right?

A. (Nods head.)

Q. Now, you say somewhere along the way, Frank, [1405] you felt that you were shouldered with a cross that happened that night, or sometime later in the week, or when did it happen?

A. It happened ever since that time when the incident happened in the men's room where I shot

the Reverend.

Q. All right.

Did you feel any remorse? You didn't feel bad about killing the Reverend, did you?

A. It's God's will.

Q. God's will.

And that's good, isn't it?

A. God's will. You can't go against it.

Q. All right.

What happened after that, after that day, what did you do after that day?

A. Went to work like always.

Q. Take your gun to work?

A. Sure.

Q. All right.

Did you keep thinking that you had to take up guns because blacks were over populating the world?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Well, let's take February 2, 1982.

[1406] What did you think about blacks that day?

A. Haven't we already gone over this?

Q. No, it's the day after.

What did you think the day after?

A. It was the day after?

Q. February 3d, then, what did you think about blacks on February the 3rd?

A. My ideas never changed.

Q. You felt the same way about the Jews on February 3rd?

A. Sure.

Q. Did you decide to do anything about your feelings?

A. What do you mean?

Q. Well, what was this cross that you told us about?

A. Well, that means that I have started upon something from which there was no way I could get out of it except to go right to the bitter end with it.

Q. And you told us that it was a dozen or a hundred, or even a million blacks, you were going to have to kill?

A. You got to start somewhere.

Q. All right.

Did you have any ammunition?

A. Sure.

Q. How much ammunition did you have?

[1407] A. Well, I had only a few hundred rounds in February.

Q. All right.

A. But I bought more as the months went on

until I had about 3,000 rounds.

Q. About 3,000 rounds of ammunition?

A. Sure.

Q. Each round lethal in itself?

A. Sure.

Q. All right.

Where did you keep the ammunition?

A. I kept it behind the books on the shelf.

Q. All right.

Kept stocking the ammunition up then?

A. Sure.

Q. Why did you do that, Frank?

A. Got to do it.

Q. Why you got to do it?

A. Well, for two reasons. One is for protection, like I said, and survival. And the other reason is ultimately the government will try and step in and stop the war by taking away the guns, or restricting the ammunition, one or the other, it's going to come down to the point where they are going to confiscate the guns. So you got to be ready against that [1408] eventually, too.

Q. All right.

So while the war was – was the war progressing as you kept buying ammunition?

A. Get closer every day.

Q. Get closer every day.

What did you decide to do about that, if anything?

A. Fight.

Q. Fight?

A. Fight to the bitter end.

Q. Did you buy any more guns?

A. Sure.

Q. Now on February 1st, you told us that it was as if God stuffed people's ears and made you invisible.

Did you see a man there that day by the name of Timothy Sheehan?

A. I don't remember him.

Q. You don't remember him.

You have seen some pictures since the trial started?

A. If he was there that day --

Q. All right.

A. I don't know.

[1409] Q. You have seen some pictures since the trial started?

A. Sure, a lot of pictures.

Q. Did you see – do you remember some pictures of Timothy Sheehan?

A. I saw them.

Q. Yes.

A. I saw the pictures.

Q. Sure.

The man you saw on August the 27th, six months after February the 1st, you saw him seven months, you didn't see him back in February, did you?

A. He might have been there, I don't really remember, to tell you the truth.

Q. He might have been there.

You heard the policeman testify, Detective Harvey Beavers, the other policeman that testified, that – well, what they said you told them?

A. Well, I think I know one thing for sure.

Q. What's that, Frank?

A. I don't think he saw me, if I did see him, because he made no report about it. If he was there, he would have made a report about something he saw and he, obviously, didn't.

Q. We are talking about, now, Timothy Sheehan?

[1410] A. Sure.

Q. Did you tell the police the reason you went back in August to look for Timothy Sheehan is because he might have seen you in February?

A. I didn't go back looking for the guy.

Q. Oh, you didn't

A. That was pure coincidental in August.

Q. Yes.

But did you tell the police that you did that?

A. I don't remember telling them that, no.

Q. All right.

Let's go through then the Spring of '82, March and April and May.

You continued to stockpile ammunition then?

A. (Nods head.)

Q. All right.

By June 4, 1982, about how many rounds of ammunition did you have then?

A. Maybe 1500, or 2000.

Q. All right.

You were pretty well protected then, weren't you?

A. Not really. Ultimately, I wanted to have about 10,000 rounds.

Q. About 10,000 rounds, each round lethal, no [1411] doubt?

A. I would hope so.

Q. Sure.

In any event, let me now direct you to the west side of Cleveland, West 117th and Madison Avenue.

It's now near midnight and you are at the Black Horse, or about the Black Horse Cafe, in that general area. Are you with me?

A. Sure.

Q. All right.

What were you doing that day?

Had you gone to work that day?

A. I don't remember. It was on a Friday, so I probably went to work.

Q. You probably went to work.

Were your philosophies the same that day as they were on February 1, 1982?

A. Sure.

Q. All right.

The cross that you were shouldered with on February the 1st, had you done anything about that between February 1st and June the 4th?

A. No.

Q. The race war that you told us was inevitable, had you thought about that?

[1412] A. Sure. I thought a lot about it. I thought it was regrettable, but unavoidable.

Q. Well, why do you say regrettable, Frank?

A. Well, because it is always regrettable, isn't it, when you have to fight a war.

Q. All right.

You felt it was regrettable and on June the 4th, 1982, were you near 117th and Madison?

A. Sure.

Q. Did you have your gun with you, the Erma?

MR. NUGENT: Objection, Judge.

THE COURT: Objection sustained.

Q. Well, Frank, what did you have with you on

the 4th of June, 1982?

A. My .22 semi-automatic pistol.

Q. All right.

Why were you on the west side of Cleveland, any particular reason?

A. Yes, I was over Reddish's house, my friend.

Q. And who is Reddish now?

A. Ronald Reddish.

Q. Ronald Reddish. Who is he?

A. He is a fellow that I met in the party, in the movement, who we share a lot of similar ideas.

[1413] Q. You share the same philosophies then?

A. I'm not speaking for Reddish now, but we were in the same movement together, so we have certain similarity of opinion.

Q. Certain common denominators?

A. Sure.

Q. All right.

And you were with Reddish, were you, in the area?

A. I went over his house and then he wanted to go somewhere, or do something, so he went in his car and I went along as a passenger.

Q. All right.

Did you have a car at that time, Frank?

A. Sure I did.

Q. What kind of a car did you have?

A. I had a red '69 Seville.

Q. All right.

A. Malibu.

Q. You drove that over to Reddish's house?

A. Yes.

Q. All right.

And then you went for a ride in Reddish's car, which was a what?

A. A green '75 Buick LeSabre.

[1414] Q. '75 Buick LeSabre.

Was this a convertible?

A. Sure.

Q. All right.

Carry your gun that day?

A. Sure.

Q. All right.

Always carry your gun?

A. Always.

Q. All right.

Couldn't leave home without it?

A. Right.

Q. All right.

What did you do that night?

A. Well, I remember riding around and ending up

at the Rapid Transit station, getting out of the car and going in the Rapid Transit station, and there was nobody in there.

Q. Why did you go in the Rapid Transit station? Were you looking for somebody, or –

MR. NUGENT: Objection, Judge.

THE COURT: The objection is sustained. Approach the Bench for a second.

(Thereupon, a sidebar discussion was had between Court and counsel off [1415] the record and out of the hearing of the jury.)

Q. Well, anyway, Frank, you told us that you went in the Rapid Transit Station and what happened?

MR. NUGENT: Objection, Judge, I'm sorry, can I get an answer on his first question why did he go in?

MR. SHAUGHNESSY: Oh, I'm sorry. I'm sorry. Excuse me. Please withdraw the question.

Q. Frank, why did you go in the Rapid Transit Station?

A. I thought I saw a black guy go in there.

Q. All right.

A. And I was going to go in after him.

Q. All right.

A. When I went in there, he wasn't there.

Q. Why when you saw a black guy on June the 4th, 1982 at 11:30 p.m. at West 117th and Madison,

did you decide to go in after him?

A. Well, there were two white women that were down in the Flats at one of these disco places. I forget the name of the place, but I heard, and I read in the newspaper, when they came out of the disco and they went to the parking lot to get in their car, [1416] a black guy had abducted the two of them at gunpoint and he forced them in the car and one he raped and the other one he killed, he shot her.

Q. Does that upset you, Frank?

A. I figured there must be a blood atonement made for this crime.

Q. All right.

A. So I went in the Rapid Station, looked for the guy I thought I saw go in there. When I went in there, he wasn't there. I don't know where he went. So I came back out and I was going to get back in Reddish's car when I saw him come from across the street. He came out of the bar, the Black Horse.

Q. All right.

A. He went back in the Rapid Station then.

Q. All right.

Now, Frank, you said you felt there should be a blood atonement?

A. Sure.

Q. Tell the folks here, if you will, what do you mean by an atonement, or a blood atonement?

A. Well, the death of those, the death of that one white girl, and the other one who was raped, she

suffered terrible trauma at the hand of this animal. There had to be – something had to be done about [1417] that. If more people do more things about it, this kind of stuff wouldn't go on.

Q. Now, the guy, the black man that you thought you saw go in the Rapid Station, did he have anything to do with that?

A. Sure.

Q. What did he have to do with that?

A. He is on the same side as the guy that did the killing and the raping.

Q. You are saying because he was –

A. He was wearing the same uniform.

Q. All right.

Because he was black and because you felt the other person was black, that's why you went in after him?

A. The reason the women were attacked is because they were white. It goes on all the time.

Q. All right.

And did you feel that you were fighting back when you went to the Rapid Station?

A. Sure, definitely.

Q. All right.

[1418] In any event, you went in the Rapid Station, didn't see anybody there, so you came back out?

A. Sure.

Q. All right.

Before going in the Rapid Station, where had you been that night, what kinds of places had you gone to?

A. I don't remember.

Q. How long had you been with Reddish in his automobile?

A. I don't remember. The only thing I remember about that night I was going in the Rapid Station, that is fairly clear.

Q. Your relationship with God, you just told us about war, did you feel any special relationship with God that night?

A. I felt I had a job to do.

Q. All right.

Did you feel it was good to do that job?

A. It's a job that has to be done. And nobody else is going to do it.

Q. Did you feel it was bad to do that job?

A. No.

Q. What was the job that you felt you had to do?

A. I had to fight for my people.

[1419] Q. All right.

A. For my survival.

Q. What was the specific job, though?

A. The job is to eliminate the threat and those that are taking us.

Q. All right.

What were you going to do when you went into the Rapid Station?

A. I was going to shoot the guy.

Q. And why were you going to shoot the guy?

A. He is an enemy.

Q. All right.

And the guy wasn't there though?

A. No.

Q. So you came back out and you got in the car and you hadn't done the job, right?

A. I thought he took a train, or disappeared, or something. I couldn't figure out where he went at first.

Q. Were you disappointed when you couldn't figure out where he went?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Well, how did you feel when you couldn't figure out where he went?

[1420] A. Well, I was disappointed.

Q. All right.

You didn't feel good then?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. What happened then?

A. Well, I was going to get back in the car and we were going to drive away when he popped up out of nowhere. He came across the street out of the bar and he walked right past us into the Rapid Transit Station.

Q. Where were you and where was the car that you were in parked?

A. The car parked in that turnaround.

Q. That's at 117th and Madison?

A. Sure.

Q. Right across from that bar?

A. Right.

Q. All right.

You told us this guy walked right past you and he was black, right?

A. Sure.

Q. Did you say anything to Reddish?

A. I don't remember what I said to him?

Q. What did you do?

[1421] A. I might have said wait here a minute, I'll be back.

Q. All right.

A. Something like that.

You know, I didn't want him to leave me and drive off.

Q. What did you do?

A. Went in after the guy.

Q. You got out of the car?

A. I wasn't in the car yet. I was standing outside of the car.

Q. I see. All right.

A. The guy walked right past me into the station.

Q. All right.

What did you feel like when you went in after him?

A. I felt like I had to get the job done, over with. There was urgency involved there, you understand.

Q. Why was there urgency involved?

A. Well, he already gotten away once, I couldn't let him get away twice.

Q. Why couldn't you let him get away twice?

A. I couldn't do it.

Q. Would the war have been lost if he had gotten [1422] away?

A. No, just the battle.

Q. Just the battle. He didn't get away, did he?

A. Well, it's strange, you know, I shot at him but he didn't die.

Q. All right.

A. I did all I could do.

Q. You did all you could do to kill him?

A. Sure.

Q. All right.

And why did you do all you could do to kill him?

A. Put him out of the way.

Q. And did you feel –

A. That's the job of a soldier. When you are at war, your job is to inflict casualty on the enemy. Your job is to kill the enemy.

Q. And did you see that as your job on June the 4th?

A. Sure.

Q. Were you hunting at that time for the enemy?

A. I was when I went in after him I guess.

Q. You were stalking him?

A. Well, I couldn't say I was stalking, because I already had him, all I had to do was go in and get [1423] him.

Q. All you had to –

A. Stalking is when you haven't got him yet, and you are looking for him.

Q. And he had no defense?

A. He might have been armed, or not, I had no way of knowing.

Q. Was he a soldier, too?

A. He was wearing the uniform of the other side.

Q. Was he a soldier, too?

A. I had to way of knowing. In this kind of war, civilians, and everybody is involved, just like if a

bomb comes falling out of the sky, you don't know where it is going to land, on a solider, or it is going to land on a woman, or it is going to land on a little child. When a bomb comes down, it blows up whoever is there.

Q. So it didn't matter then?

A. But we do it all the time. You open the bomb bay doors and the bomb goes down, but you don't know what's down there, but they go down there.

Q. So it didn't matter then if Mr. Hardaway was a solider or not?

A. He sure wasn't on our side.

Q. Because the war –

[1424] A. He wasn't on our side.

Q. He wasn't on our side. All right.

And you tried and did everything you could to kill him?

A. Sure.

Q. All right.

A. You got to reduce the numbers.

Q. All right.

Frank, did you somehow feel – let's back up.

How did you feel after you saw him fall to the platform and you walked down the steps?

A. Pretty good.

Q. Pretty good.

Why did you feel pretty good.

A. I had accomplished something that evening for one thing.

Q. Did you celebrate then?

A. Yes, I think I did.

Q. What did you do when you celebrated?

A. I had a pizza and a couple Cokes.

Q. All right.

Did you find out somewhere along the way that Mr. Hardaway didn't die?

A. Yes.

Q. How did you feel when you heard that news?

[1425] A. Kind of bad.

Q. Kind of ruined the whole day, huh?

A. No, I thought I did something wrong, you know.

Q. Did you kind of feel that maybe God had let you down?

A. No, he hadn't let me down, but, obviously, it wasn't his plan for Hardaway to die.

Q. Otherwise Hardaway would have died?

A. Right.

Q. You would have killed him?

A. Sure.

Q. All right.

Now, we get up to August the 9th, 1982.

At Cleveland State University, did there come

a time when you went back there?

A. Yes.

Q. Incidentally –

A. I used to go back there quite a bit.

Q. How did you feel about Cleveland State University? What did you think about it?

A. You've got to realize what's going on there. That's one of the places where they are brainwashing the people.

Q. Who is?

A. And they are twisting minds.

[1426] Q. Who is twisting the people's mind?

A. The Jews and the system, through their educational process, they are brainwashing the youth.

Q. All right.

A. Misleading them and leading them astray. That's like the factory when they turn out the brains, where they mold the opinion the way they want it.

Q. That upset you, then?

A. Well, it's a prime center or concentration of their power and something has to be done there.

Q. And even though you had found one book that you considered to be a little gem, you didn't feel good about Cleveland State?

A. No. You see, because I don't know how the book got there. Maybe it kind of snuck in there. Maybe they didn't realize what it was or didn't read

it before they put it in there.

Maybe somebody donated it to them, for all I know.

Q. You used to go there, and what did you do when you went there?

A. Well, I studied the place real good.

A. Why did you study the place real good.

A. Well, I wanted, you know, to learn all about it, find out what was going on there so we could do [1427] something about it.

Q. What were you going to do about it, Frank?

A. Well, I was going to close the university down for one thing.

Q. How were you going to close the university down?

A. Well, create terror over there and make the conditions such that they could no longer insure the safety of the students and they would have to close the university down.

Q. Would that be something good?

A. Yeah.

Q. Because it was a factory where they were twisting people's minds?

A. Brainwashing factory.

Q. And who do you blame for that?

A. Jews mostly. All the professors are Jews. Almost all of them are Jews.

Q. Are the Trustees or the head of the university,

are they Jews, too?

A. A lot of them. Not all of them, but most of them.

Q. Cleveland State is a State University, right?

A. Sure.

Q. It's under the control of the State, isn't it?

[1428] A. Sure. Who controls the State?

Q. Well, you tell us, Frank, who controls the State.

A. The Jews run the state. They run everything. They run the United Nations. They run the President. They run the whole show.

Q. And that's why it would be good then to stop Cleveland State from operating?

A. Yeah. That's one of the prime targets, we got to get in, we got to get there if we're going to liberate the people, free their minds from what's going on. We've got to strike.

Q. So it is fair to say there is a dual purpose.

We've got to liberate the people and we also have to keep the blacks from over breeding or over populating them, right?

A. Sure. There's a lot of work that's got to be done.

Q. There's a lot of work to be done?

A. Unfortunately there's a lot of work to be done and not enough people to do the job.

That's why I say a cross, because the amount

of work that falls on my shoulder is so great that one man can hardly stand up to it.

Q. But you had how many rounds of ammunition that [1429] August?

A. 3,000 rounds.

Q. Would that have been enough to do the job?

A. Well, it would have been sufficient to pry down a large portion of the enemy, the enemy ground forces.

All the police and everybody would have been running and scampering.

They wouldn't have known where and when, who and how, it would have been a lot of psychological damage, which I think I did. I think Tim Patton would agree to that.

Q. You thought there was some psychological damage done?

A. Yes.

Q. Was that good?

A. Well, they were going to have to close the school down because, hey, on Friday on guy got it and then they increased the security.

Then on Sunday another guy got it and then they increased the security and really there was nothing they could do. They were helpless.

It shows what one guy can do.

Q. How did you view your relationship with God at that time, was he still helping you out?

[1430] A. Sure.

Q. Do you think it's God's will that the university be closed?

A. Well, he wanted me to do what I could.

Q You kind of feel maybe you failed God a little bit?

A. Well, I don't think so. I don't think so because I can get up here and give my testimony and that's worth a lot, it's valuable.

Q. You feel your testimony will be helpful in ultimately winning the war?

A. Sure, because this is what we need, what we needed all along.

We need somebody to get up here and take the stand and give a reasonable logical concise explanation for those things which must be done and this has not been done until now.

Q. You feel God perhaps then is using you to do this?

A. Sure.

Q. Does it matter what happens to you?

A. No, it doesn't matter.

Q. You remember Timothy Patton and Harvey Beavers saying something abut Nathan Hale?

A. Yes, I remember Nathan Hale.

[1431] Q. Did you ever tell them anything about Nathan Hale?

A. Oh, I might have.

Q. What did you tell them about Nathan Hale?

A. Well, like Nathan Hale said, he regrets that he only has one life to give for his country.

Q. How do you feel about that?

A. Well, I'm in agreement with that sentiment a hundred percent. I'm in agreement with it.

Q. Are you willing to give your life for what you believe in?

A. Sure. I knew that from the minute I picked up this cross.

It's just like Jesus when he picked up that cross, he knew ultimately he was going to end up on Calvary and he said, "Father, if it be Thy will, let this cup pass."

He didn't want to do it but it was something he had to do and it's good for him that he did it.

Q. And you had to do it also?

A. Sure.

Q. You willingly shouldered that cross then?

A. (Witness nodding.)

Q. Frank, what happened on August the 9th at five o'clock, were you at the university at that time?

[1432] A. I think so. I think I was there, sure.

Q. Where did you go that day?

A. Well, I was always there, you know. I spent a lot of time there.

Q. You were checking it out?

A. Yes.

Q. On August 4th you lost your job, right?

A. Well, they got a science lab there where I believe they were doing some kind of top secret experiment for the government or something.

They got a classified area where nobody can go in there and something's going on in there.

Q. What do you suspect is going on there?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. What do you think is going on?

A. I told you it was one of their centers, it's one of their centers for sure.

Q. One of whose centers?

A. The Jews.

Q. And you figured what's going on is not good, it's not good?

A. I told you they had to be stopped.

Q. Is that one of the reasons you went there on August the 9th?

[1433] A. I was checking it out.

Q. You were checking it out?

A. Yes.

Q. And there came a time when you ran into a lady by the name of Coletta Dartt?

A. I remember something about that.

Q. Did you have your gun that day?

A. I think I had one of them.

Q. Do you remember which you had?

A. The derringer.

Q. Why did you carry the derringer rather than the Erma?

A. I don't know.

Q. The derringer only has the potential, is that right?

A. Well, it's not a very good gun.

Q. Two shots?

A. Sure.

Q. The derringer isn't a very accurate gun, is it?

A. No.

Q. The Erma is a very accurate gun, isn't it?

A. Right.

Q. Where did you see Coletta Dartt?

A. She was coming out of the rest room.

Q. Were you in the rest room?

[1434] A. I might have been, yes.

Q. Now, that would have been the ladies' rest room, wouldn't it?

A. I guess.

I know she was in the rest room.

Q. So it would have been the ladies' rest room?

A. Yeah.

Q. Well, if you were in the rest room with Coletta Dartt then you would have been in the ladies' rest room, are you with me?

A. Yes.

Q. What were you checking out in the ladies' rest room?

A. I don't know. I was just there.

Q. Did you feel that you were getting some help, getting some help from God on that day?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. How did you feel on that day?

A. I don't remember too much about the date to tell you the truth.

My mind is kind of sketchy on that day.

Q. On that day your mind is sketchy?

A. Yes.

Q. But you saw Coletta Dartt and what happened.

[1435] A. Well, I remember shooting at her.

Q. Yes.

Now, the war that you described that was going on was still going on on August 9th?

A. Sure.

Q. Was Coletta Dartt an enemy or was she a soldier?

A. Well, I overheard her making some conversation to her husband, I guess it was her husband.

I heard her testify here that it was her husband and they work there, he works there with her.

There was her and two other men in the room and they were making some conversation about our movement, about our party.

Q. Where were you when you heard this?

A. I was in the hallway.

Q. You were in the hallway and you were checking the school out?

A. Yes. They were talking about us.

Q. You heard people talking about the Nazi Party, and perhaps even talking about the Fuehrer.

A. Well, they were kind of laughing, you know, and making some derisive remarks about us.

Q. Did that upset you?

A. Yes, a little bit. It did upset me because they were talking about me really without knowing it. [1436] They were talking about me.

Q. If they said something derisive about Adolf Hitler, would that upset you?

A. Sure. It always upsets me.

Q. Because you have the father-son feelings for Adolf Hitler?

A. Sure.

Q. And you were upset?

A. Sure.

THE COURT: Hold it.

We'll take about a ten minute break. Don't go anywhere, just stand in place – come up.

(Thereupon a discussion was had between the Court and counsel off the record and out of the hearing of the jury.)

THE COURT: Lookit, I have been convinced this is a good time to break, so I am going to recess and send you home for the evening.

Let me see counsel for a second.

(Thereupon a discussion was had between the Court and counsel off the record and out of the hearing of the jury.)

THE COURT: Ladies and [1437] gentlemen, I'm going to send you home and I would like for you to be downstairs tomorrow morning at quarter to ten.

Remember not to discuss this case among yourselves nor with anyone else. Do not permit anyone else to discuss it with you or in your presence. Do not form or express any opinion on this case until it is finally submitted to you.

Again you are cautioned not to discuss this case – excuse me. You are cautioned not to read, view or listen to any reports concerning this case, either the press, radio, television.

We will see you tomorrow morning. Have a good evening.

(Thereupon an adjournment was had until ten o'clock a.m., Wednesday, July 6, 1983, at which time the following proceedings were had:)

[1438]

THURSDAY MORNING SESSION – JULY 7, 1983

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THE COURT: You may be seated.

Sorry for the delay, ladies and gentlemen, one of the lawyers had to be in the Court of Appeals this morning.

Mr. Shaughnessy, you may resume with your examination.

MR. SHAUGHNESSY: Thank you, your Honor.

DIRECT EXAMINATION OF FRANK SPISAK
(Continued)

BY MR. SHAUGHNESSY:

Q. Frank, when we left here the other evening, you and I were talking, among other things, about your fascination and your love for Adolf Hitler.

Do you recall that conversation?

A. Yes. Yes.

Q. All right.

Now, somewhere along the way you and I talked about those things that you had in your home, those things that were used to decorate the walls in your home, the top of the stereo, whatever

In any event, you told us that you had a framed, a gold framed photograph of Adolf Hitler.

All right.

[1439] Now, Frank, do you know what happened to that photograph? Do you still have it?

Is it here? Do you have it with your things, or don't you know where it is?

A. I think it is in that suitcase.

Q. You think it is in the suitcase?

A. Right.

Q. All right.

Now, Frank, when we started talking on Tuesday afternoon, we talked about your Mom. We talked about your Dad. Let me ask you, in the home you told us that you had a gold framed photograph of Adolf Hitler. Tell us about any other pictures, any other decorations that you may have had in the home?

A. Oh, pictures, I had a lot of pictures. I have been collecting them for years.

Q. Sure.

Now, what kind of pictures would those be, Frank? Pictures of what?

A. Pictures from books and magazines, you know, pictures of Hitler and all this stuff, World War II.

Q. All right.

Would it be fair to say, then, you were, and have been a collector of Nazi memorabilia?

A. Yes, that's correct. There is a lot of people [1440] who do that.

Q. And you were one of a lot of people then that do that?

A. Well, I would say yeah, I'm one among many, yes.

Q. One among many.

Now, during the course of the trial, several suitcases, a number of items that were yours have been brought in here in evidence. You are aware at least generally of what's here; are you not?

A. Yes, yeah. I'm aware of what's here, because a lot of the stuff I packed and I took it with me over Ronald Reddish's house.

Q. Sure. Now, Frank, when you packed I, the things that you packed, the things that have been brought in here were the things that you treasured, were the things that you wanted to keep?

MR. NUGGENT: Objection.

THE COURT: Overruled.

You may answer.

A. They were things I wanted to keep, yes.

They were what I would value more than the things I would have to leave behind, sure.

Q. Now, Frank, you said the things that you leave behind, can we presume from that that you were intending [1441] to go somewhere?

A. Yes, that's right.

Q. Where were you intending to go?

A. Well, first I was going to go to Michigan, and

that was only a stop-off point. From there I was going to go someplace else.

Q. Where is the someplace else that you were going to go after you left the stop-off point in Michigan?

A. Well, there's a group of people in the northwestern states which collectively they call themselves the Aryan Nations.

They are setting up an independent government, a territorial government for the White people up there, and I was going to take my guns and things and go up there and join them and help them fight.

Q. When you say "help them fight," you were going to become a soldier in the Aryan Nation?

MR NUGENT: Objection.

THE COURT: Sustained.

Q. Well, what were you gong to become?

A. I was already a soldier, but I was just going to become another body up there that needed people because they were destroying their government, and they needed people because there's a lot of work that has to be done. Cities that have to be built and they [1442] needed to protect themselves.

Q. All right. Frank, what do they have to protect themselves from?

A. Well, for one thing, they have to protect themselves from the Jews. The Jews are trying to destroy them.

The don't want them to set up their

government there, so I was – I have some photographs here of the place and the headquarters was bombed not too long ago and it shows the whole inside of the building where the ceiling caved down and the wall is all blown out and they have to protect themselves.

Q. Frank, you told us there is a lot of work to be done?

A. Yes.

Q. Tell the ladies and gentlemen of the jury, if you will, what is the work that you felt had to be done?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. All right. Let's go back to the home, the things that you had at home.

In addition to the photograph of Adolf Hitler, did you have photographs of Mom and Dad in the house?

MR. NUGENT: Objection, Judge.

[1443] THE COURT: Overruled.

A. Yeah, of course I did.

Q. And were they prominently displayed?

A. Well, they weren't prominently displayed because they were just little snapshots, but I had them in my family album and I took them with me, too.

Q. What things were prominently displayed in your home?

A. I had a big Nazi banner on the wall.

Q. What is a Nazi banner?

A. It's a piece of cloth.

Q. How big?

A. It stretched from the floor to the ceiling. It's a red piece of cloth and in the center there's a white circle and in the center of the white circle there's a black hooked cross.

Q. And what is a black hooked cross?

A. That's the Swastika.

Q. That's the Swastika?

A. Yes.

Q. Frank, tell the ladies and gentlemen of the jury, if you will, what the Swastika is and what it stands for.

A. The Swastika is a cross and it stands for, or it symbolizes the sin of the persecution, it stands [1444] for the crucifixion and it represents the evil tortures, evil, tortuous manner in which Jesus Christ was put to death.

It also represents the fate of all those people who choose to follow Jesus Christ in this evil world, the system that they are living under.

Q. All right.

Frank, now you told us the other day, or you explained in some detail, your relationship with God. You explained your love, your affection and your relationship with Adolf Hitler.

Tell the ladies and gentlemen this morning, how Jesus Christ fits in that picture, if indeed he does?

MR. NUGENT: Objection.

THE COURT: Approach the Bench.

(Thereupon, a sidebar discussion was had off the record and out of the hearing of the jury.)

THE COURT: Cindy, bring your machine up.

(Thereupon, a sidebar discussion was had between Court and counsel on the record, out of the hearing of the jury, as follows:)

[1445] THE COURT: Mr. Nugent.

MR. NUGENT: I have objected to the last question on the basis that I don't believe that it is relevant to the inquiry.

My recollection of the testimony has been thus far that according to this defendant his reason for killing the Reverend Rickerson is the fact that the Reverend was a queer, and according to the defendant, the Reverend approached him to do some type of devious sexual conduct, and that's why he killed him.

And that he shot John Hardaway because John Hardaway was a black man and that two white girls were taken from a disco and one was raped and one was murdered. And so he needed to give retribution on John Hardaway because he was black. For that reason because of the white girls having gone through that, the man met his death.

And that Coletta Dartt was shot because he was investigating to see which kind of scientific experiments were going on in Cleveland State University. He was in a restricted [1446] area and heard people talking, unknowingly, he said of him, describing the conduct of, I think he was referring to the Reverend Rickerson's death. So he was angry, and he waited in the bathroom for Coletta Dartt. And she came in and he attacked her.

And the question was about how God fit in with the Nazi here. He has not given one bit of defense that says he is doing any of the killing, or any shooting that related to the Nazi's belief whatsoever. In fact, he said the contrary in response to the questions Tuesday.

THE COURT: Okay. You – I'm sorry.

MR. NUGENT: The objection – another thing, my impression of this testimony is that the defendant is explaining to this jury that not only is he guilty of the crimes charged, but that he is explaining to them why he is guilty and everything that surrounds it. It is a complete admission of his guilt.

My objection is not only to relevancy, but it is to make this record clear, I'm aware of what's going on, and if the defense has a [1447] reason, or motivation, that he wants to get all these admissions in front of them, that's their tactic, as long as the record is aware that's their purpose.

THE COURT: Mr. Shaughnessy.

MR. SHAUGHNESSY: Your Honor, rest assured that this examination is not a Kamikaze

attempt to later claim foul to the Appellate proceedings. The record on Tuesday is replete, and we have the transcript, about the cross to bear, that God directed each of his operations. Unlike Mr. Nugent, I think I share the view of almost everyone who heard and read that, that this guy is an absolute certified lunatic.

As far as we know, God didn't send him to do these things. His relationship with God and God giving him the cross, the job as he foresaw he, he explained the other day, God was right there on his right shoulder, so to speak, or he was on God's leash, if you will, directed certainly by God.

Now, we went into that the other day. He explained the thrust of the – the thrust of the State's case, and I might say this is [1448] in the evidence that has been admitted, and that should be in the record. There is just literally tons and tons of things that have to do with God, the Nazi Party, the White People's Party, the relationship with Jesus Christ and certainly we have got into that the other day and we still have three or four more – two or more killings to explore. And we would like to –

THE COURT: I will overrule the objection.

(Thereupon, the following proceedings were had in open court:)

THE COURT: The objection is overruled.

Cindy, would you read the question back.

(Thereupon the record was read as follows:)

"Q All right.

Frank, now you told us the other day, or you explained in some detail, your relationship with God. You explained your love, your affection and your relationship with Adolf Hitler.

Tell the ladies and gentlemen this [1449] morning, how Jesus Christ fits in that picture, if indeed he does?")

THE COURT: You can answer that question.

THE WITNESS: Okay. Sure. In the book of Isaiah, the Prophet, Chapter 59, Verse 19, the Scripture reads, "When the enemy shall come in like a flood, the spirit of the Lord shall up a standard against him."

And the standard that they are referring to was the flag designed by Adolf Hitler and he first raised it in the streets of Germany in 1919, that flag, the Swastika flag, stands for Jesus Christ, that's what Adolf Hitler stood for.

Q. Now, all right, Frank, you told us the other day about the cross, the cross that you said you had to bear, the cross in your words the other day, paraphrasing your words the other day dealt with the extinction of the non-Whites, the extinction of the Jews.

Will you explain to the ladies and gentlemen this morning your concept of the cross that you were given to bear?

A. The cross that I was referring to is the Swastika. When one accepts that cross, one is going to be [1450] hated and persecuted by this evil world

system, and the people in it that we are living in.

It says so in the Bible, those who choose to follow Christ, they will behave, they will be persecuted and drag you into the Synagogue and bring you before the rulers of men. They would try to execute you and this is al happening right now.

Q. Now, Frank, you already told us you are the defendant in this case, is that not true?

A. Sure.

Q. You are being tried as a criminal, is that not true?

A. I am being tried as a criminal, too, but I am not a criminal.

Q. All right, Frank. If you are not a criminal, tell us, tell the ladies and gentlemen of this jury, what you are.

MR. NUGENT: Objection.

THE COURT: Overruled.

Go ahead.

A. I am a prisoner of war. In the war that is being fought between the forces of light and the forces of darkness, which I am temporarily a triumph over my material body.

Q. You talked about the forces of light and the [1451] forces of darkness.

For the edification of those of us that don't know which side you are on, will you explain to the ladies and gentlemen, are you on the side of the forces of light or the forces of darkness?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I am on the side of the forces of light.

I am fighting against the forces of darkness which are represented by Satan and his children, the Jews and Satan creation which is the dark races.

Q. You told us that Satan's creations are the dark races?

A. That's true.

Q. How do you explain that, Frank?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. They are the forces of darkness that we the forces of light are fighting against, and it says in the Bible, Our Father is white and there is no darkness in him.

Q. Now, Frank, are we not all decedents of Adam and Eve, including the black races?

A. No, I don't believe that.

Q. All right. If the black race does not descend [1452] from Adam and Eve, please explain to the ladies and gentlemen from whence they come.

A. Only the white race descended from Adam.

Q. You then have an explanation as to the origin of the black races?

A. I believe they are created by the Devil, by Satan.

Q. And you base that on what, Frank?

A. I base that on my interpretation of the Bible as I read it.

Q. Now, you told us you are a soldier. When did you first become a soldier?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I first became a soldier when I became aware of the warfare that was going on and in my own mind, and in my own soul I had to make a determination which side I was going to be on.

Q. So which side did you choose?

A. I chose the side that I was born a member of. I decided to be true to that which I was born, this cause I was born, that's what I chose.

Q. You said a few moments ago there was a lot of work to be done?

A. Indeed.

[1453] Q. Is there still a lot of work to be done?

A. Indeed.

Q. On August 30, 1982, were you a soldier on that day?

A. What day?

Q. August 30, 1982, were you a soldier on that day?

A. Sure, sure.

Q. Were you a soldier in which Army?

A. The Army of Light.

Q. Do you have an immediate superior or commander?

A. My immediate superior is God.

Q. Do you have anyone that you report to or that you take directions or orders from?

A. No, only I am in charge.

Q. You are in charge, your superior, your immediate and only superior then is God himself?

A. Indeed.

Q. In any event, on the 30th day of August, 1982, you were a soldier?

A. Yes.

Q. Tell the ladies and gentlemen of the jury what you did that day?

A. Beginning what time of day?

Q. Well, let's begin when the day began at one-[1454] midnight, one minute after midnight.

A. Well, I was sleeping at that hour. I don't even remember what time I got up that day.

Q. You heard the testimony in the courtroom, have you not, Frank, that at 4:45 a.m. somewhere on Euclid Avenue in the 2000 block you shot Brian Warford and killed him?

A. 4:45 a.m.?

Q. Right.

A. Well, I don't think it was that time.

Q. Frank, did you kill Brian Warford?

A. I shot him.

Q. And why did you kill Brian Warford?

A. It was my duty.

Q. What was the guy that led you to kill Brian Warford?

A. My duty is to inflict the maximum amount of damage and casualties on the enemies as I am able to do.

Q. Was Brian Warford the enemy, is that why you killed him?

A. Indeed he was.

Q. Tell us what time on August 30, 1982, you killed him?

A. I didn't have a wristwatch on me, you understand, [1455] but I would approximate the time about 2:30.

Q. That would be about 2:30 a.m.?

A. Yes.

Q. Let me go back to the question that I asked a few moments ago starting on that day, the 30th day of August, the clock now approaches midnight, August 29th is over, but a memory, it's nothing but a memory. August 30th is now a brand new day, what are you doing?

A. I was riding around with Ronald Reddish, my friend.

Q. You were with Ronald Reddish, your friend?

A. Yes.

Q. And what were you doing?

A. Well, we were riding around the streets of downtown Cleveland.

Q. What were you looking for, if you were looking for anything?

A. We were in search of the enemies. We were on a search and destroy mission.

Q. You were on a search and destroy mission?

A. Yes.

Q. Tell the ladies and gentlemen, if you will, Frank, what kind of a day was it? Was it warm, was it cold, was it raining?

[1456] A. It was a warm and clear summer night.

Q. What day of the week was August the 30th, the brand new day?

A. I think it was a Monday morning.

Q. Monday morning?

A. Or Sunday night.

Q. Presumably Sunday night you and Ronald Reddish set about on a search and destroy mission seeking to search out and destroy the enemy, the black people, right?

A. Right.

Q. What time did you and Ronald Reddish start the mission that night, the search and destroy mission?

A. I don't remember the exact time, but it was more or less early in the evening, like about eight

o'clock or so.

Q. Did you wait for the sun to go down and darkness to envelop the city before you started the mission?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. Did you wait for darkness?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I think we did because the darkness seems to bring them out more than the daylight.

[1457] Q. The hunting is better than at night, is that right?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. Sure.

Q. Tell us, Frank, when did you meet up with Ronald Reddish that night?

A. I went over to his house in the afternoon or the early evening and we were sitting around the house just talking.

Q. What were you talking about, Frank?

A. We were talking about what needed to be done.

Q. And specifically what needed to be done?

A. Specifically the problem of elimination that is involved here, the problem of trying to protect and

secure our own extensions through the extinction of the enemies and on that particular night after we had sat around talking about it, we decided rather than just sit around talking about it, we should do what our duty command us to do and that was to go out and do our duty.

Q. Did you arm yourself before going out to perform your duties?

A. I was already armed.

Q. What were you armed with, Frank?

[1458] A. I had three handguns, I had a .28 automatic fully loaded with an extra clip, hollow point bullet.

I had a .22 automatic fully loaded with an extra clip, hollow point bullet, and I had a derringer, two shot loaded with hollow point bullets.

Q. All right.

Frank, tell the ladies and gentlemen what is a hollow point bullet?

A. A hollow point bullet, or in this case what we refer to as a hollow point bullet is the type of bullet used in some law enforcement work and in some hunting grounds where the bullet upon impact will expand and cause the maximum amount of damage to the target that it hits.

Q. A hollow point bullet, does it kill better than a non-hollow point bullet?

A. I think so. I would presume that was the reason it was invented, or at least brought into the general practice.

Q. How many hollow point bullets were you armed with when you se about to do your duty on the 29th of August?

A. I would say 49 or 50.

Q. How many, Frank?

A. About 49 or 50 hollow point bullets.

[1459] Q. About 49 or 50 hollow point bullets and each one of them lethal, no doubt?

A. I would hope so.

Q. Now, Frank, I will hand you what the court reporter at an earlier time has marked Exhibit 59 –

MR. NUGENT: Objection, Judge.

THE COURT: come up.

(Thereupon a discussion was had between the Court and counsel off the record and out of the hearing of the jury.)

Q. I'm going to show you what we have labeled as Exhibit 59.

Can you see Exhibit 59?

A. Yes.

Q. All right.

Now, tell the ladies and gentlemen, if you will, what is Exhibit 59?

A. That's my derringer pistol.

Q. Your derringer pistol.

A. Yes.

Q. There are two holes, in a sense, two barrels,

one over, one under. How many rounds does that pistol hold?

A. Two.

[1460] Q. Two. All right.

What size, what caliber is this derringer pistol that you told us about?

A. .38 Special.

Q. Are those hollow point bullets?

A. I had hollow points in that night.

Q. You had hollow points in there that night?

A. Sure.

Q. And the .38 bullet is as big as, is it not, the hole from which it could come?

A. Yes.

Q. Or maybe a little bit smaller?

A. Oh, a few thousandths of an inch smaller.

Q. A few thousandths of an inch smaller than the hole, right?

A. Right.

Q. And the bullets that you had that night when you went out on the searching and destroying mission were hollow point bullets, right?

A. Jacketed hollow points.

Q. Jacketed.

Explain to the ladies and gentlemen, Frank, what a jacketed hollow point bullet is?

A. A jacketed hollow point bullet has a, I believe it is, a copper clad casing over the lead.

[1461] Q. All right.

Frank, and why is there a copper casing over the lead?

A. I don't know the exact reason why they have that casing there, but it improves the efficiency of the bullet somewhat.

Q. And the efficiency in your view was to do what?

A. To strike down whatever it is that you re shooting at.

Q. To kill the enemy?

A. Right. Right.

Q. Now, Frank, you had two hollow points – or did you have two hollow points in this derringer that night?

A. Sure.

Q. Sufficient to kill two of the enemies, right?

A. Or one.

Q. Or one. All right.

Where did you have this derringer, in your pocket, in your belt, on the floor of the car?

A. I had that in the holster that was stuck down inside my boot.

Q. I see.

And you wore what kind of boots?

[1462] A. These tall boots like – what do they call them?

Q. Hobnail boots, perchance?

A. Not hobnail boots.

Q. Not hobnail boots.

A. You see a lot of young men wearing them nowadays with their jeans.

Q. I see.

And were you wearing your jeans that night?

A. Sure.

Q. But you had your boots on and you had the derringer with two hollow point bullets in the holster in the boot?

A. Right.

Q. All right.

Now, Frank, you told us you had a .22 pistol. Would the .22 pistol, perchance, have been Exhibit 168 which I will show you?

A. Turn it over there a second.

Yes, that's it.

Q. All right.

Now, this is the Erma, the weapon that you heard described here from the witness stand from the various witnesses called by the State?

A. Sure.

[1463] Q. Are you with me?

A. Right.

Q. And how many bullets, how many bullets would fit into the Erma?

A. You can put seven in the clip.

Q. All right.

A. And if you know how to do it, you can put one more in the chamber to keep the fun fully loaded, giving it eight shot capability.

Q. Giving it eight shot capability.

On that particular night, the 29th of August, did you have eight shots in the Erma?

A. Definitely.

Q. All right.

When did you buy this Erma?

A. I bought that particular handgun I believe on the 25th or 26th of August.

Q. All right.

Is this a carbon copy, if you will, of the Erma that's sawed in half?

A. Yes.

Q. Who sawed the other Erma in half?

A. I did.

Q. Why did you saw the other gun in half, Frank?

A. I don't know, but I'm sorry I did.

[1464] Q. Were you –

A. Because I had to go out and spend another $160 to buy this other one over here.

Q. This Exhibit, this gun, this Erma, cost you $160?

A. Sure did.

Q. All right.

A. It is brand new.

Q. And you are sorry that you cut the other gun in half?

A. Right.

Q. Why are you sorry, Frank?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. Why are you sorry? Tell the ladies and gentlemen why you are sorry.

A. I had to spend a lot of money to replace it.

Q. All right.

Are you sorry that Reverend Rickerson died at 1:15 p.m. on February 1, 1982?

A. No.

Q. Are you sorry that John Hardaway died, or almost died at 11:30 p.m. on June 4, 1982?

A. No.

Q. Are you sorry that Coletta Dartt narrowly [1465] escaped a bullet at 5:05 p.m. on August 9, 1982?

A. I don't know about that.

Q. You don't know about that.

Help me out then, if you will.

If you would like to tell us something about Coletta Dartt?

A. I didn't mean to shoot at her.

Q. You did not mean to shoot at her. All right.

A. But it's just the way it happened. She frightened me, and I was a little bit upset.

Q. Coletta Dartt wasn't the enemy, was she?

A. I wasn't hunting her, if that's what you mean.

Q. You weren't hunting her.

Were you sorry that Mr. Sheehan was killed at 6:23 p.m. on August 27, 1982? Were you sorry that he was killed?

A. Well, I'm sorry about that now.

Q. All right.

Why are you sorry about that now?

A. Well, I sort of didn't realize at the time who Mr. Sheehan was.

Q. Why did you kill Mr. Sheehan?

A. I thought he was one of those Jewish professors there at Cleveland State, there that liked to hang around the men's room and seduce and pervert and [1466] subvert the young people that go there.

Q. All right.

You found out since that Mr. Sheehan wasn't one of the enemies then?

A. Well, I learned he wasn't Jewish like I thought he was.

Q. That's why you are sorry then?

A. Sure.

Q. All right.

A. It was a mistake I think.

Q. All right.

Frank, are you sorry that Brian Warford was killed at 4:45 a.m. on the 30th of August, 1982?

A. No.

Q. But you are sorry that you cut your gun half sometime before that date?

A. Sure.

Q. Why are you sorry that you cut your gun in half?

MR. NUGENT: Objection, Judge. He told us twice already.

THE COURT: Overruled.

THE WITNESS: Well, at the time I cut it in half, I thought it was no good. And I was going to destroy it, but then later [1467] on I had a change of heart and I went out and bought another one just like it and it turned out to be pretty good after all.

Q. All right.

A. So there was no need to destroy it in the first place.

Q. The gun that you had destroyed then had served you well?

A. Yes, it did.

Q. All right.

Now, let's get back to the evening of the 29th of August.

You were at Ronald Reddish's house, you were talking about the work the needs to be done. You told us you put the derringer in your boot.

Where did you put the Erma?

A. I put that in my right vest pocket.

Q. All right.

And a vest such as I might – as I have on this morning?

A. No. I had one of these denim – blue denim jackets, I think it is a Wrangler jacket.

Q. A Wrangler jacket. All right.

A. And I tore the sleeves off of it on both sides so it looked like a vest.

[1468] Q. All right.

A. And I could put that pistol right in that pocket. It fit in there perfectly.

Q. All right.

And nothing showed when you put it in the pocket?

A. No, nothing.

Q. All right.

Did you have any other guns, any other thing that would kill that night?

A. Sure.

Q. All right.

A. I had the .38 automatic.

Q. The .38 automatic, that's a handgun, or a rifle?

A. It's a handgun. It looks like the one you have in your hand except the bullet is bigger.

Q. All right. What size bullet did you put in the .38?

A. Nine millimeter.

Q. A nine millimeter., is that bigger or smaller than a .38-caliber?

A. About the same size.

Q. All right.

Were the nine millimeter bullets, the slugs that you put in the .38 that night, were they hollow point?

[1469] A. They were silver tips.

Q. Silver tips.

Tell ladies and gentlemen of the jury what a silver tip is.

A. A silver tip is a special hollow point which was designed for law enforcement purposes. And it is very effective, the most effective commercially available hollow tip ground that you can buy.

Q. Now, when you say effective, Frank, what do you mean by effective?

A. By effective I mean that the bullet gives

maximum expansion upon hitting the target at the moment of impact.

Q. In other words, it kills better; is that right?

A. Mathematically, I suppose, a good scientist could sit down and work out a formula saying that if the expansion characteristics of the bullet were such that it gave maximum expansion, it would improve the reliability of the bullet –

Q. I see.

A. To its power.

Q. And is that why you had that bullet that night?

A. Sure.

Q. And what time did you and Ronald Reddish set [1470] about on your hunting party?

A. About eight or nine o'clock.

Q. All right.

A. I don't remember the exact time because, as I said earlier, I didn't have a stop watch, or a wristwatch.

Q. All right.

Frank –

A. Time was not an important factor.

Q. You left the home then on Marvin Avenue sometime shortly after dark. Tell the folks where you went.

A. Oh, let me think. We drove all over the downtown and east side area up and down different

streets.

Q. All right.

And you were hunting?

A. Sure.

Q. All right.

Now, how did you fell when you left the Reddish home? Were you upset? Were you elated?

MR. NUGENT: Objection, Judge.

Q. Feel bad, good?

THE COURT: Overruled.

A. Anxious.

Q. Anxious.

[1471] A. Sure.

Q. Describe your anxiety, if you will, to the jurors?

A. Well, it is like when you go hunting, you want to know if you are going to be successful, you want to know what the evening holds in store. So I was anxious, you know, I wanted to get out there, and see what was going to happen.

Q. And were you intent, or hopeful in bringing home a trophy?

MR. NUGENT: Objection, Judge.

THE COURT: The objection is sustained.

Q. All right.

Now, you felt anxious. What did you do?

A. Looked around a lot.

Q. And did you see what you wanted to see when you looked around?

A. Not at first.

Q. All right.

How long did you drive around hunting?

A. Couple of hours, burned up about a tank of gas I think.

Q. You burned up a tank of gas?

A. Sure.

[1472] Q. All right.

In that time that you took to burn up a tank of gas, did you find what you were hunting?

A. No.

Q. All right.

And where did you drive around?

A. I'm trying to think of the names of the streets. Wait a minute.

We went up and down Central, Cedar. We went up Euclid and Carnegie. We went all the way to 105 and we came down Chester.

Q. All right.

A. Back towards downtown.

Q. You told us earlier that you and Reddish were on a search and destroy mission; is that right?

A. That's what I thought it was.

Q. You were searching then?

A. Sure.

Q. All right.

There came a time sometime earlier in the morning when you found Brian Warford; is that true?

A. Before that happened Reddish and I parted company.

Q. All right.

And where and under what circumstances did you part company?

[1473] A. He drove me back to his house, said he was going inside and go to sleep, that he was tired.

Q. Were you tired at that time?

A. No.

Q. Were you disappointed?

A. No.

Q. All right.

A. Because in a way I was glad to be rid of him.

Q. All right.

Had the night up to that point been successful?

A. No.

Q. All right.

Were you still anxious?

A. Sure.

Q. After you left Reddish's house then, after he went in and went to bed, whatever, what did you do?

A. I took my car, which had been parked at Reddish's house all that night, I got in my car and I went downtown on my own.

Q. All right.

And did you have your derringer with you?

A. Sure, always.

Q. You had the .38 with you?

A. Sure.

[1474] Q. And you had the Erma with you?

A. Sure.

Q. All hollow point bullets, each one of them lethal?

A. Correct.

Q. You went back downtown, Frank, what did you do?

A. Well, I drove up Carnegie, Prospect, Euclid and Chester Avenue. I just drove around by the University a little bit.

Q. Why the University, Frank?

A. Well, that seemed to be like the best spot.

Q. The best spot to do what?

A. To inflict the first casualty.

Q. All right.

There came a time then when you did inflict the first casualty, is that right?

A. Well, I saw somebody on the corner there at the bus stop.

Q. And who did you see on the corner at the bus stop?

A. He was a young black male sitting there.

Q. He was just sitting there?

A. Yeah, in the bus stop.

Q. Tell the ladies and gentlemen of the jury how he [1475] was dressed.

A. Well, he was dressed pretty shabby.

He had on one of those old beat up straw hats, green Army jacket and blue jeans.

Q. You have seen the straw hat that was brought into the courtroom by Sharon Rosenberg, this straw hat here (indicating), is that correct?

A. Yes, that's it.

Q. It was the same straw hat that you saw in the bus shelter, is that right?

A. Yep.

Q. And the blue jeans and the Army jacket?

A. Green one.

Q. Green?

A. Army jacket.

Q. Not the Army you were in?

A. Nope.

Q. Where did you park your car if indeed you did park your car?

A. I parked it in the back of Stillwell Hall.

Q. And where is that with relation to the bus shelter?

A. It's northwest.

Q. You saw the young black man seated in the bus shelter, you saw the straw hat, the blue jeans, the [1476] green Army fatigue jacket and you went and you parked your car, right?

A. That's right.

Q. How did you feel then?

A. I felt pretty excited for one thing.

Q. Palms sticky with sweat, maybe?

A. Well, I wasn't paying attention.

Q. Adrenalin starting to pump?

A. Yeah, I think so.

Q. Did you feel good?

A. Sure. I was getting excited.

Q. You were getting excited?

A. Yes.

Q. Then you got out of your car, didn't you?

A. Sure.

Q. You took your Erma out of your Wrangler vest pocket, didn't you?

A. Nope.

Q. What did you?

A. I walked across the dark, in the dark and

empty campus from where I parked the car to Euclid Avenue and I looked around and I didn't see nobody on the campus.

I couldn't figure out where all the police were because just a few days before they had all the [1477] excitement over there about the janitor being shot in the men's room and they were bragging or telling the people that they had increased their security. They were telling the people they had around the clock patrols and it was going to be safe.

I didn't see nobody over there. I didn't see nobody in sight.

For all I know, they might have been in the office drinking coffee, saying, well, nothing is going to happen, we can sit around here.

Q. That's what you thought about them as you walked across the deserted campus?

A. Well, I didn't see no security men or nobody with the walkie-talkie or the police dogs or the helicopters or any of that stuff.

Q. Did the feeling of excitement mount as you walked across?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. In any event, you walked across the campus?

A. Yes.

Q. Tell the ladies and gentlemen of the jury what happened.

A. When I got to the corner, he was still sitting

there where I first saw him.

[1478] Q. All right.

How close did you get to him?

A. How close did I get to him?

Q. Yes.

A. Oh, about as far away as me and the first juror, maybe a little bit further, about that close. But certainly not closer than you and I are.

Q. He was still sitting there in the bus shelter?

A. Well, it looked like he was almost asleep. He had his head down like this (indicating), you know, his chin was touching his chest and he looked like he might have been sleeping there.

Q. When you looked at him, what did you see?

A. I saw one of the enemies that was sleeping there and I had caught him off guard.

Q. You caught the enemy sleeping?

A. Well, it's always best to attack at the point of least resistance or at that point where you can catch the enemy unaware.

That is always a wise strategy. Every good general knows that. Every good general knows that if he wants to be successful, so here I caught one.

Q. Did you see how young he was?

A. Yeah. I thought he looked like maybe about 19 or 20.

[1479] Q. 19 or 20, a young guy?

A. Yeah. It's best to get them when they're

young.

Q. It's best to get them when they're young?

A. Indeed.

Q. How long did you look at the enemy?

A. Not long.

Q. A second, two seconds, ten seconds?

A. I couldn't tell you really. I couldn't tell you.

Q. What did you do then?

A. I shot him.

Q. Did you have the gun in your hand?

A. It was in my pocket.

Q. You took the gun out of your pocket?

A. Sure.

Q. Did you point the gun at him?

A. Of course.

Q. What part of your gun did you point at him?

A. The head.

Q. Why did you do that?

A. Because that seemed like the best place, aim for head.

Q. You aimed for the head?

A. Yes.

[1480] Q. Did you pull the trigger?

A. Sure.

Q. How many times did you pull the trigger?

A. I don't remember.

Q. Was it more than once?

A. Yeah.

Q. More than twice?

A. Definitely.

Q. How many rounds did you have in the Erma?

A. Eight.

Q. All hollow point bullets?

A. Yep.

Q. Each one lethal, right?

A. Every one.

Q. How did you feel when you were pulling the trigger?

A. Good.

Q. Were you excited?

A. I felt like I was finally doing something constructive for my race and for my people.

I felt it had to come down to this in the end sooner or later.

Q. Did he ever stand up?

A. Nope.

Q. Did you ever see his face?

[1481] A. Nope.

Q. But you felt good?

A. I just saw him go down.

He didn't even make a sound from where he was sitting there sleeping.

He just went right down to the ground and he laid there.

Q. What did you do then?

A. I left.

The job was done sot here was no reason to stick around.

Q. When you left, how did you feel?

A. Pretty good.

I was just worried about getting back across to the side of the campus to where I put the car because I figured in the early morning hours it was so quiet somebody was bound to hear all the shots.

Strange as it seems, as I went across there was no alarm, no human cry, no lights coming on or sirens flashing or anything like that.

Once again I was able to make my way unseen and unheard.

Q. All right.

Then did you feel pretty good about that?

[1482] A. Sure.

I felt like I had help in this.

Q. You had help from whom, Frank?

A. It had to be help from God because the set-up was so perfect, you know.

It was just like a movie stage and you don't find things like that every day.

The set-up was so perfect.

Q. Did you think God wanted you to kill Brian Warford?

A. He certainly set it up that way.

Q. And when you got him, what did you do?

A. I went to sleep.

Q. How did you feel when you got home?

A. Very good.

Q. You felt very good?

A. Yes. I felt like the evening had turned out successful and meaningful and purposeful.

Q. When you went home, you went home to the 53rd Street house?

A. Yep.

Q. And when you came in the door that night, did you [1483] happen to see the picture of Adolf Hitler?

A. I didn't notice it.

Q. Did you listen to any tapes, any of the tapes you told us about that night?

A. No.

Q. Did you listen to any of those tapes any time during August.

A. Sure.

Q. How often would you listen to the tapes, the Hitler tapes?

A. Every week if not every day.

Q. If not every day?

A. Yep.

Q. How would you feel when you listened to the tapes?

A. Okay.

Q. Would you feel excited?

MR. NUGENT: Objection

THR COURT: Sustained.

Q. Now, Frank, do you remember the little girl Sharon, the neighbor, the girl in apartment number three?

A. Sure.

Q. Now, Sharon came in and told us that she lived there for a number of years, how many I don't remember; [1484] but she had at least a casual speaking relationship with you, right?

A. Well, she used to knock on my door quite a bit and ask me for a cup of sugar or a roll of toilet paper or stuff like that, you know.

Q. Did you give her the roll of toilet paper or the cup of sugar?

A. Sure, because the poor girl was – she didn't have a husband and she wasn't working and she was on Welfare.

I figured it would only be right to help her out because she wasn't as fortunate as me in having a steady income and a good income like I did when I was working, so I gave her what she wanted, you know, I was generous.

Q. Incidentally, Frank, when you returned home after killing Brian Warford, was anyone else in your apartment?

A. Nope.

Q. You remember Sharon telling us, the neighbor, the girl across the hall, do you remember her telling us about a time when you wore your hair differently and you wore some eye shadow and some make-up and she called you Frankie Ann?

A. She never called me that.

[1485] Q. She never called you that?

A. No.

Q. You remember she told us, as a matter of fact on the first day she became acquainted with you that you were dressed differently, femininely, if you will, you were dressed differently than you are now?

A. I heard her tell that.

Q. Is that true, Frank?

A. Maybe.

MR. NUGENT: I didn't hear that, Judge.

THE COURT: He said "Maybe."

MR. SHAUGHNESSY: You ask –

THE WITNESS: Perhaps this is true and –

Q. Perhaps it is true?

A. Perhaps this is true, yes.

THE COURT: I think this is possibly a good time – come up here.

(Thereupon a discussion was had between the Court and counsel off the record and out of the hearing of the jury.)

THE COURT: Okay.

It's lunchtime.

[1486] We're falling a little behind here, and obviously, it's not your fault.

Why don't you be ready to come back up here about 1:30 and maybe we will work a little later today, five o'clock or 5:30, so notify whoever you have to notify.

Remember the admonition and we'll see you at 1:30.

(Thereupon an adjournment was had until 1:30 p.m., Thursday, July 7, 1983, at which time the following proceedings were had:)

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[1487]

THURSDAY AFTERNOON SESSION, JULY 7, 1983

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THE COURT: You may be seated. You may resume your examination.

MR. SHAUGHNESSY: Thank you, sir.

DIRECT EXAMINATION OF FRANK SPISAK
(Continued)

BY MR. SHAUGHNESSY:

Q. Frank, when we broke for lunch, or just prior to breaking for lunch, we were talking about the Erma, the semi-automatic pistol, the derringer and the .380.

Now, let me show you, if I might, what we marked as Exhibit 223. Tell the ladies and gentlemen of the jury, if you can, Frank, what this is, if you know, whose it is and something about it?

A. Sure. That is a Ruger mini-14, and it belongs to Ronald Reddish.

Q. All right.

Now, you say a Ruger, that's the make of the weapon?

A. Yes, the manufacturer.

Q. Fine.

What kind of a weapon is it, Frank?

A. It's a semi-automatic carbine.

[1488] Q. What kind of bullet does it shoot?

A. Rifle bullets.

Q. All right.

Is it a .22-caliber, or a .32-caliber?

What caliber is it?

A. It is actually considered a .223-caliber, which

is the same diameter as a .22, but the slug is longer in length, giving it more expansion than a .22.

Q. All right.

The slug is longer in length and it gives it more expansion.

Are you telling us that the slugs fired from this gun then kill better?

A. It is a hunting round.

Q. It is a hunting round?

A. A military round.

Q. A military round.

Frank, how many rounds of ammunition can you put in this weapon?

A. That would depend upon the type of magazine that the weapon in question was outfitted with.

Q. All right.

A. There are five, ten, 20, 30 and even 40 round magazines available.

Q. 30 and even 40.

[1489] And when you say semi-automatic, it will shoot just as quickly as one can pull the trigger, or is that not true?

A. When the weapon is functioning properly, yes.

Q. All right.

Have you ever fired this weapon?

A. Sure.

Q. Now, you told us it was Ronald Reddish's gun

that you went hunting with the night you killed Brian Warford, is that right?

A. We had ridden around earlier, yes.

Q. Where was the weapon kept at his home or his house?

A. It was kept in his home. I believe it was the bedroom he kept it.

Q. Now, Frank, you told us that you can have 30, up to 30 or 40 rounds. Are the bullets that you put in this gun, can you put hollow point bullets in the gun?

A. I think there's a hollow point round commercially available, yes.

Q. What kind of bullet did you or Reddish have for this gun?

A. I think we had the jacketed bullet there and it gave you a greater expansion characteristic.

[1490] Q. The jacketed bullet you told us this morning has a greater expansion ability and thus it kills better, is that right?

A. It's more effective.

Q. More effective. All right.

Now, Frank, Exhibit 231, let me show that to you. Tell the jurors, if you will, what this is and who it belongs to.

A. That's a Crossman BB gun and it belongs to me.

Q. Is that what we call an air rifle?

A. Yes, pump air rifle. The more times you pump it, the more velocity the BB has when it comes out.

Q. This is a lethal weapon?

A. I wouldn't consider it lethal, but it could be.

Q. Whose weapon is this?

A. It's mine, as I stated.

Q. Where did you keep this, Frank?

A. I kept it in my bedroom.

Q. Now, you told us that you are a soldier. You told us about the military connections, the air rifle or the BB gun, was that part of your arsenal?

A. Yes. In a very general sense it was. This particular piece of artillery there, it was used to target practice.

[1491] Q. In other words, this exhibit then was something that you sharpened your ability to kill with?

MR. NUGENT: Objection.

THE COURT: Overruled.

MR. SHAUGHNESSY: Withdraw the question.

Q. Frank, what did you use this weapon for?

A. Oh, I used it for shooting bottles and cans.

Q. Why did you shoot bottles and cans, Frank?

A. I like to see the bottles explode when the BB hits them.

Q. Does that make you think of anything when a

bottle exploded?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. How does that make you feel, Frank?

MR. NUGENT: Objection.

THE COURT: Overruled.

THE WITNESS: Does that mean I answer it?

Q. You can answer it.

THE COURT: You may answer.

A. I don't know what it makes me think. It's just something I like to do.

Q. All right. Does it help you improve your aim?

[1492] MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Now, Frank, we have Exhibit 170. I'm going to show you 170 and I want you to tell the ladies and gentlemen here, if you will, what this is?

A. That's a single shot 12 gauge shotgun with the folding stock.

Q. Is this a military or hunting weapon?

A. Neither. I think it's sort of a collector's item.

I have never quite seen one like it anywhere. It's unusual.

Q. Who does this belong to?

A. That belongs to me.

Q. And where did you buy Exhibit 170?

A. I bought that from a guy that worked in the factory with me and his name was John Mazurkiewicz.

Q. Was that the gentlemen that came in here some few days ago and told us about selling some guns?

A. Sure.

Q. You say it's a single shot 12 gauge shotgun. What is a 12 gauge shotgun?

A. 12 gauge is the diameter of the shell. That is the number that has been designated for the shell. [1493] The gun in question utilizes that.

Q. Is the 12 gauge shotgun a little shotgun, or a medium sized shotgun or a big shotgun?

A. I think it is a big one.

Q. It is a big one.

Are there any bigger than 12 gauge?

A. If there is, I'm not aware of it.

Q. All right.

And what kind of bullets, or what kind of slugs can you put into a 12 gauge?

A. You can put anything from bird shot up to double 00 buckshot in there.

Q. And what's the double 00 buckshot, Frank, for the edification of those of us who may not know?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

You may answer.

THE WITNESS: That's a potent slug that the police use often in their own shotguns. I think we had an officer come in and testify, did we not, about his own shotgun that was loaded with seven rounds of double 00 buck.

Q. All right.

Now, Frank, this exhibit, the Exhibit 170, [1494] is your exhibit. Where did you keep this?

A. I kept that in my bedroom.

Q. Now, what did you keep it for, Frank?

A. Primarily in case of burglars.

Q. All right.

A. I felt this is the most effective weapon for home defense, especially in a situation where you have to shoot at someone in the dark and you want to be sure of hitting them.

This will do the job.

Q. Now, Frank, you told us that you were a soldier. You told us that you had a cross, that you willingly shouldered the cross and you went out hunting to exterminate blacks.

Was this part of your arsenal?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

THE WITNESS: It was part of my arsenal that I kept in my home.

I did not take it with me when I went out.

Q. All right.

You didn't hunt with Exhibit 170 then?

MR. NUGENT: Objection.

THE COURT: Sustained.

[1495] Q. All right

Frank, Exhibit 222-A. Do you know what this is?

A. Yes.

Q. What is this, Frank?

A. That is another 12 gauge shotgun.

Q. Who does that belong to?

A. It belongs to Ronald Reddish.

Q. All right.

Ever fire this gun?

A. Yes.

Q. 12 gauge gun again?

A. This one is different because it has multi-shot capability.

Q. How many shots can you put into this one?

A. Seven.

Q. Seven.

How quickly can you fire it?

A. As quickly as you can pump and pull the trigger.

Q. Did you ever hunt with this gun?

A. Yes.

Q. What did you hunt with this gun?

A. People.

Q. All right.

What kind of people did you hunt with this gun?

[1496] A. Black people.

Q. All right.

Now, Frank, when you went hunting black people with this gun, what kind of ammunition did you use?

A. Double 00 buck.

Q. Double 00 buck.

And double 00 buck you told us is what?

A. The most potent slug you can use in that particular weapon.

Q. All right.

Did you ever kill anyone with this weapon?

A. No.

Q. Now, Frank, I want you to take a look at Exhibit 224. And tell the juror, if you will, what is Exhibit 224?

A. That's a .22-caliber semi-automatic rifle.

Q. All right.

And whose weapon is it?

A. That's mine.

Q. All right.

When did you buy this weapon?

A. Sometime in 1980.

Q. All right.

It's a .22 rifle, you said?

A. Yes.

[1497] Q. And how many bullets can you put in this gun?

A. 18.

Q. 18.

And can you put hollow point bullets in this gun?

A. Yes.

Q. Now, Frank, did you ever go hunting with this gun?

A. No.

Q. Frank, there is a strap on the butt of Exhibit 224. What is the strap for?

A. That's for if you want to carry it on your back, or on your shoulder, leave your hands free to do other things.

Q. A few other things.

Tell us about the other things that the strap may be helpful?

A. It may be helpful if you were going to take aim, you could wrap the strap around your arm and give the gun more stability as you fire.

Q. All right.

Some way you hold the end of the strap and wrap it on your arm, a rigid – is that what happens?

A. The other end of the strap should be connected [1498] to the wooden part there.

Q. It connects somewhere up in here then?

A. It looks like it came off.

Q. All right.

And you wrapped it around your arm and your arm is more rigid, isn't it?

A. Sure. You could do that.

Q. And when you do that, your aim is a little bit better, isn't it?

A. Supposedly.

Q. And you could kill with a little more accuracy; isn't that true?

A. Supposedly.

Q. All right.

And did you go hunting with this gun?

A. No.

Q. Did you intend to go hunting with this gun?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Now, Frank, when you went hunting on August 29th, and you told us about the fellow in the bus stop the morning of the 30th, you said that Brian Warford never looked up, or never woke up; wasn't

that your testimony?

A. Something like that, yes.

[1499] Q. Did you ever seen Brian's face? I think you were about as far apart as you and I are now, right?

A. About that far, yes.

Q. Did you ever see his face?

A. Not real good, no.

Q. All right.

I'm going to hand you what our court reporter has marked as Exhibit 118.

Would you take the photograph and take a moment and look at it and kind of get a sense of what you see and tell us a little bit about it?

A. What's to tell?

[1500] Q. That's a photograph of Brian Warford, isn't it?

A. I don't know for sure. If that's what you say.

I never really looked at him that good.

Q. Because you didn't' see his face that morning?

A. Well, it was dark and he had the hat on his head and was looking down like this (demonstrating).

Q. He was looking down?

A. Yes.

Q. Well, you have the opportunity, haven't you, Frank, Mr. Nugent was introducing the photographs,

the pictures, we saw the pictures, I seen them, you have seen them, Jack Gardner, Mr. McGinty, we have seen them, we looked at them, didn't we?

A. Oh, yes.

Q. And you know that's Brian Warford, don't you?

A. Well, if that's what you say.

Q. Now, you told me this morning, Frank, that Brian Warford was the enemy.

A. Sure.

Q. And you weren't sorry that you killed him, you wanted to kill him, right.

A. Sure. That's what has to be done.

Q. It has to be done?

A. Yes.

Q. What has to be done?

[1501] A. We have to eliminate them or they are going to eliminate us.

It's a question of survival.

Q. Now, let me have you look at the exhibit. Let me have you look at Exhibit 117 and that's another angle, another view of Brian Warford's face.

A. Uh-huh.

Q. Now, Frank, you told the jurors that that had to be done, that Brian Warford was the enemy and you're not sorry?

A. Right.

Q. Now, you looked at the pictures.

A. Sure.

Q. When you looked at the pictures, how did you feel, how do you feel?

MR. NUGENT: Objection.

THE COURT: Well – approach the bench.

(Thereupon discussion was had between Court and counsel off the record and out of the hearing of the jury.)

Q. Now, Frank, I'm going to withdraw that question. I'm going to ask you, Frank, back at 4:45 a.m. on the morning of August 30th, how did you feel that morning, were [1502] you sorry?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. No.

Q. You said you weren't sorry; how did you feel?

A. Proud.

Q. Proud.

Now, Frank, you told us this morning that you did feel kind of sorry about Mr. Timothy Sheehan after you found out some things on August 27th, 1982, do you remember that testimony?

A. Yes, sir, I do.

Q No, I'm going to hand you some photographs, and I'm going to ask you to take a look at them.

Take a minute and look at Exhibit 79, Exhibit 78—well, maybe Exhibit No. 104. Now, take a minute, Frank, and look at the photographs, if you will.

Have you done that?

A. Sure.

Q. All right. You know whose shown in this photograph, don't you?

A. Yes.

Q. Now, tell us, if you will, Frank, what are those photographs, what do they show?

A. Tim Sheehan.

[1503] Q. Tim Sheehan?

A. Yes.

Q. And he is dead, isn't he?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

A. It would appear to be.

Q. Well, you killed him, didn't you, Frank?

A. I shot at him.

Q. You shot at him.

Did you kill him?

A. If you mean by the act of shooting him, did that cause his death?

Q. Yes, did you kill him.

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

THE WITNESS: Can I answer that?

THE COURT: You may answer.

A. It would appear that that was the case.

Q. And you were a little bit sorry about that because you told us you found out he wasn't a Jewish professor?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. Is that right?

A. Yes, sir. I thought this man was a Jewish professor and it turned out he wasn't.

[1504] Q. You fired the gun, didn't you?

MR. NUGENT: Objection again, Judge.

THE COURT: Overruled.

Q. Did you fire the gun, Frank?

A. Sure.

Q. Where were you when you fired the gun?

A. I was in the doorway.

If you look at the sketch over there, you can see where the doorway is.

Q. Is that a pretty accurate sketch?

A. Yes, I would say so.

Q. How far away from Tim Sheehan were you when you fired the gun?

A. I would say about as far as I am from Mr. Nugent. That's a rough approximation.

Q. You were 16 to 20 feet?

A. Well, if we got a tape measure and we went to the location, we could verify it.

Q. You saw Mr. Sheehan, Mr. Tim Sheehan before you shot him, didn't you?

MR. NUGENT: Objection, Judge.

Q. Well, did you see him?

A. Sure.

THE COURT: Overruled. Go ahead.

[1505] Q. Did you see him before you shot him?

A. Sure, I saw him standing there.

Q. What was he doing before you shot him?

A. He was standing at one of the urinals and he was staring at me.

Q. He was staring at you?

A. Yes, he was looking at me.

Q. Could you see his eyes?

A. Yes.

Q. And you thought he was Jewish?

A. Sure.

Q. And where did you have your gun?

A. In my pocket.

Q. Did you take your gun out?

A. Sure.

Q. And what did you do then?

A. Aimed right between his eyes and shot him.

Q. How many times did you shoot him?

A. More than once.

Q. When you took your gun out, how did you feel?

A. I don't remember.

Q. Well, let's back up just a little bit. When you went there that morning, you took your gun with you, didn't you?

MR. NUGENT: Objection.

[1506] May we approach the bent, Judge?

(Thereupon discussion we had between Court and counsel off the record and out of the hearing of the jury.)

[1507] THE COURT: Put another question.

MR. SHAUGHNESSY: Sure.

Q Frank, when you left home on that day, the 27th of August, 1982, did you take anything with you?

A. Yes. I took many things with me.

Q. Well, tell us what you took with you?

A. I took my wallet and my identity papers, some cash and my pistol.

Q. Your pistol.

Did you have bullets in the pistol?

A. Yes.

Q. What kind of bullets did you have in the pistol?

A. .22-caliber hollow points.

Q. All right.

And how many times did you fire the gun at Mr. Sheehan?

A. I don't remember exactly how many, but when I went to reload it later, there were four rounds missing.

Q. All right.

And did there come a time he fell on the floor?

A. Sure.

[1508] Q. All right.

And how did you feel when he fell on the floor?

A. Pretty good. When I saw him go down, I knew I hit him.

Q. And what did you think when you saw him on the floor?

A. I thought I did a good job.

Q. All right.

A. I think he went down right away.

Q. The big photograph, the 6 x 6, or whatever it is, 104, did you see that? You see the scene depicted there, right?

A. Yes.

Q. All right.

Did you see that scene before in real life?

A. No.

Q. All right.

What did you see when Mr. Sheehan went down?

A. I just saw him fall down on the floor.

Q. All right.

A. He was laying down on his side.

Q. All right.

A. On his back.

Q. Frank, when did you find out that Mr. Timothy Sheehan wasn't a Jewish professor?

[1509] A. When the newspapers ran the story about him, they detailed his history as being an Irishman.

Q. All right.

Now, you told us that when you saw him go down you felt pretty good.

How did you feel after you read the newspaper story?

A. I felt bad because I made a mistake.

Q. All right.

Now, you told us – you told us two days ago, on Tuesday, you told us that we were all predestined.

Do you remember that testimony?

MR. NUGENT: Objection, Judge.

THE WITNESS: Something like that.

THE COURT: Overruled.

MR. SHAUGHNESSY: Hold it.

THE COURT: Overruled. Go ahead and

answer.

Do you remember saying that?

THE WITNESS: Yes, I do.

THE COURT: Put another question.

Q. You say you made a mistake?

A. It wasn't my intention to take that man's life.

Q. All right.

Now, you heard testimony here about the beeper, [1510] right?

A. Yes, sir, the beeper.

Q. All right.

Did you take Mr. Sheehan's beeper?

A. Yes.

Q. And why did you take Mr. Sheehan's beeper?

A. It was laying there on the floor. After he hit the floor, and I went over there to retrieve my brass casings, I wanted to pick them up, and the beeper was laying there.

So I picked it up along with my brass, put it in my pocket.

Q. All right.

Now, Frank, tell the jurors, if you will, why did you want to retrieve your brass casings?

Why did you want to do that?

A. Brass is worth money. You can turn it in after you collect a sizable amount of it.

You can get a little bit of scrap money for it.

Q. Scrap money for it? All right.

Did you have any other reasons for retrieving the scrap casings?

A. It's sloppy to leave it laying around.

Q. It's what?

A. Sloppy.

[1511] Q. Sloppy. You didn't want to be sloppy then?

A. No.

Q. Now, Frank, you told us that in February of 1982 that you killed Reverend Rickerson.

Do you remember that testimony?

A. Yes.

Q. All right.

Did you see Revered Rickerson on the floor?

A. No.

Q. How did you feel after you shot the gun that time?

A. Okay.

Q. Just okay?

A. I felt good.

Q. All right.

Why did you feel good?

A. I had thought I had eliminated that particular threat right there.

Q. And what threat did Revered Rickerson pose?

A. Posed a threat to me and to the white race.

Q. All right.

Now, you told us about some kind of a hole in the metal, the metal dividing the stalls in the bathroom.

Do you remember that testimony?

|1512|A. That's true.

Q. How big was that hole?

A. It was about like that (indicating).

Q. About a foot wide?

A. Pretty big size hole.

Q. If you know, how had that hold been made? Was it cut out or kicked out?

A. Vandalism, somebody had taken some sharp metal object and cut through the wall.

Q. All right.

A. Separating the two commodes.

Q. Did you ever see that hole before you went in there on February 1, 1982?

A. Sure had, the hole was there for a long time.

Q. All right.

A. And then –

Q. Well, let's stop.

A. At some point in time the University replaced the wall with another wall and whoever made the first hole came back and made another one.

Q. Um-hm.

You said it was there for a long time. How long did you know it to be there?

A. Years. It was there for several years.

[1513] Q. Several years.

Didn't you say it was replaced and somebody made another hole. When did that happen?

A. I don't remember the exact date, but the first one might have been there in 1980 or '79, and the second one was put in about '81.

Q. All right.

A. It was there for a long time.

Q. Now, Frank, did you know anything about that hole? You knew it was there. Did you know anything about it?

A. I think I know why it was put in there.

Q. Tell us about the hole between the stalls in the bathroom.

A. That hole was put in by people who were going there and they were using that hole to facilitate having their homosexual encounters in there.

Q. Did someone tell you that, Frank?

A. You could deduce that using your own logic, just by looking at the hole and the graffiti that was written on the wall and the –

Q. All right.

A. It was obvious to anyone who went in there what was going on.

Q. But you never saw that happening, did you?

A. I saw things happen in there several times, too.

[1514] Q. All right.

The graffiti on the wall and the hole, did that offend you?

A. Yes, in a way it did.

Q. Why did it offend you?

A. It didn't seem right. It's not right. It says so in the Bible it is not right.

Q. What does it say in the Bible?

A. It says that homosexuality is an abomination, that God will punish it with death.

Q. All right.

That upset you, didn't it?

A. Yes, it bothered me a lot.

Q. Now, Frank, this morning we started to talk about the little girl Sharon, the little girl in Apartment No. 3. Do you remember what we talked about?

A. Yes.

Q. All right.

And Frank, when she testified she told us some things about you had your hair frizzed up or something, you had some eyeliner on and you had, whatever, some perfume on, and that was the first time that you and she met.

Do you remember her testimony?

A. Yes, I remember her saying that.

[1515] Q. Is that true, Frank?

A. I suppose so.

Q. When did that happen, Frank?

A. 1977 or '78.

Q. You remember the young kid who came in and testified, maybe you remember his name but I don't;

the young fellow that came in and said that he used to sit on his porch there on 53rd Street and he would whistle when you walked by if you walked by with makeup, some girls clothes, or something like that; do you remember that?

A. Yeah.

Q. And you kind of laughed when he said that, didn't you?

A. Yeah.

Q. Everybody kind of laughed, didn't they?

A. Yeah.

Q. Because it was kind of funny, wasn't it?

A. Kind of crazy.

Q. But was it true, Frank?

A. Yeah, it may have been true.

Q. It may have been true?

A. Yeah.

Q. If it was true, about when did this happen?

A. 1978.

Q. 1978. Now, tell the ladies and gentlemen here, if [1516] you will, Frank, about 1978 and about the frizzed hair, the eye shadow or eyeliner and those things, tell us about that, if you will.

A. Well, there's not much to tell, really, except that I was pretty confused back then. I wasn't like I am now.

Q. Now, how are you now, Frank?

A. Well, I'm okay now. I got my mind straightened out and I think clearly now.

Back then I wasn't thinking right. My mind was being subverted and perverted by these Jewish ideas that they are trying to spread like at Cleveland State.

They are trying to encourage the youth in homosexuality and trying to subvert them and pervert them and twist their minds because they are out to destroy us and at that time they had seized control of my mind and I was doing things they wanted me to do.

Q. Did you kind of feel you were a victim of that then?

A. Well, sure. It's hard to accept the programming of today's society because there's so much of it and they are so organized and the gates are open but it's so blatant, they're so blatant about it and the Jewish psychiatrists are saying there's nothing wrong with this, this is completely normal behavior so the pressures is being put on people to go into that.

Q. All right. Does that upset you now, Frank?

[1517] A. Sure.

Q. Are you upset now thinking about it?

A. Sure.

Q. Excuse me, please.

Did you wear eyeliner and did you frizz your hair?

A. Yeah, I did that for a while.

Q. For how long?

A. About a year.

Q. Do you know what a sex change operation is?

A. Sure. I heard about that and I read about that a lot.

Q. You read about that a lot?

A. Yes.

Q. Did you ever try to have one?

A. Well, I went to see a psychiatrist one time and when we started talking, I wanted to see if they would go ahead and do that.

They said they were going to go ahead and do that for me, they were going to do that.

Q. They were going to do that?

A. That's right.

Q. And that was in 1978?

A. Right. They were very eager to do that. They were almost looking for people that would come to them so they could do that. They seemed to have some real interest in [1518] performing these operations.

Q. Now, you told us about the perfume and whatnot, the women's clothes.

Did you ever change your name?

A. Yeah. I went down to the driver's license bureau where you get your driver's license and I had them change it.

I wanted to see if they would do it and they did.

Q. They did it?

A. Yeah. They were real willing to do it. They were willing to go along with it. They didn't see nothing wrong with it.

Q. What did you change your name to?

A. I changed it to Frankie Ann Spisak.

Q. Frankie Ann Spisak?

A. Yes.

Q. Did you get the license issued in that name then?

A. Sure, the picture and everything.

Q. The picture on the driver's license, was that a picture of you as you are now or –

A. No.

Q. What did the picture on that driver's license show?

A. It showed me with a big hair-do and big glasses. It was sort of different facial features than I have now.

Q. How about the moustache?

[1519] A. No, I didn't have that.

Q. You have done some reading on the sex change, is that right?

A. Sure. They are publishing a lot of books about it now. Nowadays it's a real popular thing.

Q. Back in '78 did you feel comfortable as a man?

A. I don't know how – well, I went to a psychiatrist. We had a lot of talks about different things.

Q. Did you feel more comfortable as a lady?

A. No. That's why I quit that because it wasn't natural, it's not right.

Q. Had you read the things in the Bible? Had

you read the things in the Bible that you told us about before you did these things in 1978, did you know about that then?

A. Not really. When I was a kid I read the Bible, you know. I learned most of the stories about the famous people and what they did and all that.

I read about Jesus but I really didn't get into it until later on, you know. My mind became more open and then I began to see what was really going on and who was behind it. Then the spirit of the Lord really started to go to work on me.

Q. What is really going on, Frank?

A. Well, the things that's going on is the Jews, and in this case the Jewish psychiatrists are tying to subvert [1520] and pervert and twist everybody's mind into accepting what is not normal; they are getting the youth to accept this and they did the same thing in Germany before Hitler came to power. The same thing was going on over there that's going on here today, it was going on over there, but he put a stop to it.

Q. Hitler put a stop to it?

A. He sure did. He took all the Jewish psychiatrists and all the things they were doing and he put them in the concentration camp where they could not bother normal society anymore.

Q. Frank, you joined the Nazi Party about 1971.

A. Sure.

Q. Is it fair to say in 1978 then you were still in the Nazi Party?

A. No, I wasn't.

Q. Was there a time you dropped out?

[1521] A. Sure.

Q. When did you drop out of the Nazi Party?

A. When I got married in 1973 I was no loner active with them.

The FBI filed that whatever it is here attesting that I was no longer active and they dropped their usual surveillance on me.

They didn't think there was anything worth looking for. So when I was married, I wasn't involved in it anymore. I just went about my family life and I went to work every day and I was just a regular normal everyday guy. I didn't pay attention to what was going on.

Q. You didn't go hunting back in those years, did you?

A. No. I stayed at home with my wife and kid.

Q. Now, what happened in 1978?

A. Well, in 1978 my marriage broke up and I was pretty confused and I started getting involved in all these things that was going on in society today and all the sex and all the dope and whatnot.

It took me about a year to wake up, find out, you know, to find out who I really was. They had me pretty confused for a while.

Q. So you were confused for about a year, but you got [1522] out of that and you are back to normal now, is that your testimony?

A. Absolutely, absolutely.

Q. Are you completely normal now?

A. Sure, sure, because whatever damage they did to my mind, I was able to overcome that because God

is helping me putting everything back in its proper place.

Q. And everything is back in its proper place now?

A. Sure, absolutely.

Q. Your mind is functioning normally?

A. Never better.

Q. Your mind has never functioned better?

A. Absolutely.

Q. You are not insane, are you?

A. No.

And I think the psychiatrist will come in here and attest to that fact.

Q. You are perfectly normal because God has helped you put everything back in place?

A. Sure, absolutely.

Q. Frank, you told us some few minutes ago about the FBI dossier.

A. Right.

[1523] Q. How did you feel about that when you found out that the FBI was making a dossier –

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Now, I am going to ask the court reporter to mark this – well, I won't have it marked. It has already been marked in one of the exhibits.

Frank, I'm going to hand you a green booklet by a gentleman by the name of George Lincoln Rockwell and it came out of that black suitcase, do

you remember that?

A. Sure, I know that book.

Q. You know that book?

A. Yes.

Q. For those of us who don't, tell the jurors – well, I supposed first of all, whose book is that?

A. It's my book.

Q. It's your book?

A. Sure. I had two or three copies of this book.

Q. Is this book important to you?

A. Sure. Anything written by George Lincoln Rockwell is important.

Q. You told us about George Lincoln Rockwell and for those of us it might have slipped our minds, who is the gentleman?

[1524] A. Well, he is no longer around, but he was the commander of the American Nazi Party in America.

Q. Is he a pretty important guy in your life?

A. Sure. I remember reading about him when I was still in junior high, and I remember the day he got killed.

I remember that day very well because it's still in my mind.

Q. Now, who is the most important person in your life?

A. Which way? I mean there is a lot of different people that are important.

Q. All right.

A. How do you want me to rank them, I mean.

Q. Who in your life you admire the most?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Now --

THE WITNESS: That means I can't answer that?

THE COURT: It means you can't answer.

Put another question.

MR. SHAUGHNESSY: All right.

Q. Whose photograph do you have in your home?

[1525] MR. NUGENT: Objection.

THE COURT: Overruled.

THE WITNESS: I had a lot of photographs in my home. I had Commander Rockwell's photograph there, too.

Q. Anybody else's?

A. Adolf Hitler.

Q. All right.

A. Sure.

Q. Do you admire Adolf Hitler?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

THE WITNESS: Sure.

Q. All right.

You told us about that, haven't you?

A. Yes, I think.

Q. How about George Lincoln Rockwell, do you admire him?

A. Yes, definitely, he was a great person.

Q. What's this book about, this legal psychological and political warfare, what's it about?

A. Well, let me see. Basically, this is eight lessons in legal matters, basic criminal law, and dealing with law enforcement agencies, and things like surveillance and being watched by the police, and [1526] what you should do when you go to court.

Q. All right.

Let's stop.

A. Things like that.

Q. Let's stop there.

Have you read that book?

A. Sure. I read the whole thing a year or two ago. I haven't seen it in the last nine months.

Q. All right.

It's kind of a how-to book, isn't it?

A. How-to book, yes, that's a good way to describe it.

Q. All right.

And you are a member of the Nazi Party, aren't you?

A. Sure.

Q. How is that book connected, if indeed it is, to your party affiliation?

A. There is really no connection. Anyone can buy this book. You don't have to be a member of the

party.

Q. All right.

A. But if you know the address where the publisher is who puts out that book, you can send in your $10.00 and get the book. Anybody can read it.

Q. All right.

[1527] You read the book. Did you understand the book, Frank?

A. Sure. It's pretty clear, easy language.

Q. Sure.

As far as you're concerned does what the book says, does that make sense to you?

A. Absolutely. I mean the book is very sensible.

Q. That book is very sensible?

A. Sure.

Q. All right.

And you are completely normal, aren't you?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Are you completely normal?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. You told us here a minute ago, Frank, that the book had something to do about going to court?

A. Right.

Q. All right.

And you have come to court, haven't you, Frank?

A. Every day now for a couple of weeks now.

Q. All right.

Did you do, when you came to court, did you do what it says to do in the book?

[1528] MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, what does it say in the book to do when you come to court?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Frank, you heard some people testifying about some of the things in this book, haven't you?

A. One or two, nobody really went into it in any great detail.

Q. All right.

It has some lesson plans in it, doesn't it?

THE COURT: Approach the Bench.

(Thereupon, a sidebar discussion was had between the Court and counsel on the record and out of the hearing of the jury as follows:)

THE COURT: Lookit, this is probably a very interesting book. However, we are not going to let you have Mr. Spisak give a review of it, a synopsis of it. I don't care what's in the book.

MR. SHAUGHNESSY: Except it is in evidence. I just wanted to ask one question, did you do whatever is said in the book. The [1529] book is in evidence.

MR. NUGENT: That's irrelevant.

MR. SHAUGHNESSY: Well –

THE COURT: Okay. That's the only question you are going to ask.

Okay. I will let you ask that. I don't want to review or give any –

MR. McGINTY: No questions or anything.

(Thereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

BY MR. SHAUGHNESSY:

Q. All right. Now, Frank, without going into what's in the book, it's fair to say that the book sets out a course of conduct or tells you what to do, right?

A. It does not set out a course of conduct, it only tells you what to do in given situations based upon the commander's own experience. That's all it says.

Q. Just one question then.

Did you do what the commander said to do in the book? Yes or no.

A. I think so.

Q. Now, Frank, we're going to hand you – I'm going [1530] to hand you another object that we took from the black suitcase and I will ask you to take a look at this and let me show you this, and you look it over and kind of get a sense of what it is.

And you tell us, if you can, Frank, after you have taken your time and you have looked it over, and you have got a sense of what it is, tell the jurors about it then.

A. Sure. This is a rare thing here.

Fear of Jews card, it's called, and in 1965 the

commander put out a whole lot of these. There is not many around anymore.

Q. Now, Frank, when you look at the face of the card, you see a picture of whom?

A. Jesus Christ, that's who is on there.

Q. All right.

A. That's him.

Q. And underneath that, it says, "And no man spoke openly of him for fear of the Jews."

Isn't that what it says?

A. It's a quote from the Bible.

Q. Now, when you open that up, whose picture is under there?

A. Adolf Hitler.

Q. All right.

[1531] You told us this is a very rare thing?

A. That's right.

Q. Is this yours?

A. Yes, sir.

Q. Is this the only one you have?

A. The only one.

Q. All right.

Is this something you want to keep?

A. Could I have it?

Q. Is it something you want to keep?

A. Sure.

Q. Why do you want to keep it, Frank?

A. Because that's the truth on there. And on the back here it's got a written explanation of what this means.

Q. Now you believe what that written explanation says, don't you?

A. Absolutely.

Q. And what does it say in big printing there on the front?

A. It says, "And no man spoke openly of him for fear of the Jews."

And that applies not only to Adolf Hitler, but that applies to Jesus Christ in His day. If you read in the bible, they will talk about the fear of Jews.

[1532] THE COURT: Okay. He asked you a question. You answered it. Put another question.

MR. SHAUGHNESSY: All right.

[1533] Q. And after that brief sojourn in 1978, when you did the things you told us you did, you are back to normal now, aren't you?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Are you normal now?

THE COURT: Sustained.

Q. All right.

Frank, another item, again, removed from the black suitcase. I'm going to hand you this and take a look at that and kind of see what it is and tell us about it.

A. Sure. That's my uniform ensignia. My lieutenant bars.

Q. Your lieutenant bars?

A. Yes, sir.

Q. You say they're yours? Have you been made a lieutenant, or promoted to lieutenant?

A. Yes, sir.

Q. Tell the jurors, if you will,—well, I suppose first, do the lieutenant bars go to which one of these organizations that you are in?

A. I'm lieutenant in the Social Nationalist Aryan People Party, which is a splinter group of the American Nazi Party.

Q. All right.

[1534] Now, when did you get to, or when were made a lieutenant?

A. I have been a lieutenant for some time, ever since 1979.

Q. Incidentally, is that a first lieutenant or a second lieutenant or maybe there is no distinction?

A. There is no distinction because we don't have that many officers in the organization right now.

Q. How many people are in that organization?

A. I really couldn't tell you that.

Q. All right.

A. I have no way of knowing even myself.

Q. All right.

Do the people, your comrades, your fellow soldiers, refer to you as Lieutenant Spisak?

A. No, they don't refer to me like that.

Q. Did you ever get any mail that says

Lieutenant Frank G. Spisak?

A. Sure. I get mail from all over the world like that.

Q. All right.

Who sends you mail from all over the world?

A. Different people in the movement, in the party.

Q. All right.

Have you gotten any mail since you came to jail?

MR. NUGENT: Objection.

[1535] THE COURT: Sustained.

Q. Now, anyway, those are your lieutenant bars?

A. Sure are.

Q. All right.

Do you ever wear those, Frank?

A. Yes, I do. I believe I had those on the night when I went out and shot Brian Warford.

Q. All right.

That's the night that you felt good?

A. Yes, sir.

Q. Now, I'm going to hand you what came out of an envelope that's marked as Exhibit 236. And I will ask you to take a look at this item, again, take a minute and turn it over, if you want, whatever you want to do with it. And kind of get a sense of what that is.

A. Oh, yes.

Q. And tell us what it is.

A. That's my T-shirt, which I had on when the police arrested me at Ronald Reddish's house.

Q. All right.

And that's the White Power T-shirt that we have been talking about, isn't it?

A. Well, I had more than one. This is one of them. The cleanest one I had. A couple other ones I wore to work and they were all dirtied up, and they had oil stains [1536] on them.

Q. All right.

A. I didn't want to get arrested with a dirty T-shirt on, so I put this clean one on.

Q. All right.

Frank, did you dress up in that shirt to get arrested?

A. Well, I knew that day there was a high probability that the armed forces of the enemy might get a hold of me and I wanted to be in uniform when I was captured because I didn't want to be accused of being a spy, so I put that on.

Q. What happens to spies, Frank?

A. They get executed.

Q. All right.

So you put on your uniform before, you didn't want to get executed?

A. Well, sure. I'm waiting behind my lines here.

Q. All right.

Now, Frank, who did you say was going to come and arrest you?

A. The armed forces of the system. You call them

the policemen, but --

Q. All right.

A. I called them the armed forced because when they come [1537] they are armed and their forces are quite strong.

Q. All right.

In that armed forces, there are people of various races and nationalities; are you with me?

A. Yes, but when they came for me they seemed to have restricted it only to one.

Q. All right.

A. They didn't send too many black people out after me.

Q. All right.

A. They were all white policemen when they came.

Q. And do you suppose they did that intentionally?

MR. NUGENT: Objection.

THE COURT: They probably didn't want to provoke me.

THE COURT: Sustained.

Disregard the answer. Put another question.

Q. You characterized the police as the armed forces of the enemy, right?

A. They are the armed forces of the state and the system. They –

Q. Is –

A. They are what we are dealing with.

Q. Fine.

Is a white policeman who isn't Jewish, is he an enemy?

[1538] MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Do you consider all the police to be enemies?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, in any event, you put on your T-shirt because you said there was a high probability you would be arrested by the enemy; right?

A. I was right.

Q. And you were right. All right.

A. Right.

Q. Now, you heard some testimony, didn't you, here, from some of the enemy who said you had given them the T-shirt and you autographed it, right?

A. I gave them the shirt and I did that writing on there just like it is.

Q. All right.

A. I did that.

Q. All right.

That was true then, wasn't it?

A. Yes. But they kind of tried to twist it around to make it look different than it actually was.

Q. As far as you doing the writing, that part is true, right?

A. Sure.

[1539] Q. And there's something on there about another good – "Another job well done."

Did you write that?

A. Sure, I wrote that.

Q. And the policemen did a good job, didn't they?

A. Yes, they did a pretty good job.

Q. All right.

And it says here, this is your writing, isn't it?

A. Sure.

Q. All right.

Is says "To Lieutenant Howard Rudolph and detectives."

A. Yes.

Q. And the first detective's name that you put there is Timothy Patton, right?

A. Patton that's him.

Q. Yes.

Timothy Patton. You remember Timothy Patton, don't you?

A. Sure.

Q. All right.

And then Don Ferris?

A. Right.

Q. Frank Kunz?

[1540] A. Yes.

Q. Edward Kovacic?

A. Right.

Q. Bob Bolton?

A. Bob Bolton, yes.

Q. You remember Harvey, don't you?

A. Yes, he was okay. He was all right.

Q. He was all right. And Harvey Beavers, is he the enemy?

A. Sure, but –

Q. But he is all right?

A. Well, he treated me with humanity and respect I deserved as an officer. He didn't abuse me or anything like that.

[1541] Q. As a captured Lieutenant, prisoner of war, Officer Harvey Beavers then extended the courtesy to you?

A. That's why I gave him my T-shirt.

I just wanted them to have something to remember me by.

Q. Fine. One good turn deserves another.

You then wrote, "For another job well done, good luck, Sieg Heil"?

A. Yeah.

Q. What is "Sieg Heil"?

A. Hail victor.

Q. You signed it Frank Spisak, 9-8-82.

A. Well, I didn't put my whole name. I just wrote down Frank Spisak.

Q. You didn't put the "G" in for George?

A. No, or the Junior. I didn't abbreviate anything or nothing like that, I just made it simple.

Q. Frank, you took some time, didn't you, to write that out?

A. Sure, when you write like this with a ball point pen on a shirt like this, the T-shirt, you have to keep going at it.

Q. And you exercised some care in preparing that, didn't you?

[1542] A. Sure. I wanted them to be proud of it.

Q. You wanted the police, the enemy to be proud of it?

A Well, yeah. They said they were going to hang that on the wall of their office and they were going to let everybody see it from now on, so I figured, well, I figured it was going to be there awhile so I might as well make it look good.

Q. Your shirt then was to be forever and ever hung on the wall at the Homicide Department; you wanted to do a good job, is that right?

A. Sure. That's why I put in there, "For another job well one."

Q. Were you proud of the job that you did in laying that out?

A. Sure. Everybody was proud of it. That's why I wrote it like that.

Q. You were extended the courtesies to a prisoner of war, weren't you?

A. Sure.

Q. That's why you did that?

A. Sure.

They said I was going to be put on trial and I expected that, too, they did that before, you know.

They did that before.

[1543] Q. Now, you did hear some testimony, didn't you, Frank, somebody, I don't know who it was that said that you kind of asked them to take your shirt because you were afraid of what was going to happen?

A. No, that's not true.

Q. Well, tell us about that.

A. Well, you see, first of all, they didn't put me with the other prisoners, they put me in the first cell right up close to where the cops got their desk so they could keep an eye on me 24 hours a day.

They didn't even want to let me have my eyeglasses and I had to beg Lieutenant Rudolph for me to keep my glasses. They didn't want me to keep my glasses 'cause he thought I was going to cut my wrist or do something stupid. They put me in the cell and they were trying to talk me out of giving up my T-shirt and everything.

They didn't want me to wear it to court because they knew the T-shirt was going to be taken from me. They were going to – they were trying to get me to put on another shirt.

Q. Well, how did you feel about this T-shirt?

A. Well, I didn't want to give it up, but finally they convinced me, they said, when you get over to the County Jail, you got to give them all of your clothes [1544] and they are going to give you a uniform, you know, like the prisoners' uniform, you can't keep your own clothes, you have to give them all up.

So then I figured, well, if I got to give it up, I would rather give it up to the police and they might

hang it up – where the might hang it on the wall rather than give it to guys in the County and they might lose it or something, and I might not ever see it again, so I gave it to the officers.

Q. You might not ever see it again, did that bother you?

A. Sure, because it's valuable.

Q. You think they were going to hang it on the wall?

A. That's supposed to be where it's been all this time.

Q. Hanging on the wall in the Homicide Department?

A. Well, that's what they told me, that's what they told me they were gong to do with it.

Q. Now, let me direct your back, Frank, and let's talk about February 1, 1982, okay?

Do you remember what kind of day it was that day?

A. Well, it was a winter day. It wasn't too cold and it wasn't snow. It was kind of a nice winter day. There was snow on the ground, but it wasn't [1545] coming down. It was kind of a nice day.

Q. You remember that day, don't you?

A. Yeah, I remember pretty much.

Q. You say you didn't go to work that day because you had a hangover, was that the day?

A. Sure.

That's what happened.

Q. Did you feel good later that day?

A. Yeah.

Q. Now, you told us on Tuesday, you told us that you shot Reverend Rickerson, didn't you?

A. Sure.

Q. You killed Reverend Rickerson?

A. Well, I learned that he died, sure.

Q. You heard on TV that he was a Reverend and you felt good?

A. Well, I didn't necessary feel good because I heard – well, I felt good first of all when I heard he was a Reverend, I thought that was unusual.

Q. Well, how did you feel about that?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Now, Frank, I'm going to hand you State's Exhibit, oh, 21, maybe State's Exhibit 1-G, and I want you to take a minute and look at those pictures, [1546] look the pictures over and kind of study them, have you done that?

A. Sure.

Q. Now in the big picture here, Frank, what do you see?

A. This one here (indicating)?

Q. Yes.

A. That's a black male laying down on the floor of the rest room and his trousers are down and there is blood on the floor there.

Q. Does it upset you looking at that picture?

A. No.

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

THE WITNESS: I'm sorry about that.

THE COURT: Put another question to the witness.

Q. Now, Frank, you have seen that photograph before, haven't you?

A. No. I've never seen this. This is the first time.

Q. Oh, all right. Did you ever see that scene before?

A. No, never.

[1547] Q. Do you know who that man is lying on the floor with his pants down?

A. Well, it might be the guy.

Q. What guy might it be?

A. The one that was in the stall on the other side of that hole that was bothering me.

Q. Are you sorry about what happened to him?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Are you sorry that you killed him?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, tell us how you felt about it?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Frank, you told us that somewhere along the way you took an oath; do you remember that?

A. Yes, sir. I remember telling you that.

Q. I'm going to hand you what we have taken again from the black suitcase.

Now, will you take a look at that again, kind of look it over and tell the folks here if you can identify what that is?

A. Okay, yes. I know what this is. This is the cover page of a magazine, the National Socialist [1548] Review, August, September, 1980.

I saved it because here on the back they got the Stormtrooper's Oath by Commander Rockwell.

Q. Now, Frank, is that piece of paper your piece of paper?

A. Yes, I think that's the one.

Q. And did you live by that oath?

A. I tried to.

Q. Tell us what that oath says.

A. Do you want me to read it, all of it?

Q. Yes, I do.

A. Okay.

THE COURT: Just a minute. Come up.

(Thereupon a discussion was had between the Court and counsel off the record and out of the hearing of the jury.)

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(Thereupon the following proceedings were had between the Court and counsel in of the hearing of the jury:)

THE COURT: This is probably a good

time to take an adjournment. Remember the admonitions. We will give you 15 minutes.

[1549] (Thereupon the following proceedings were had between Court and counsel out of the hearing of the jury:)

THE COURT: All right, what is this?

MR. SHAUGHNESSY: I haven't read it, frankly, but I thought this was going to be my finale if you would have –

THE COURT: Well, had I known.

MR. SHAUGHNESSY: Well, I would just proffer it.

I would like to read this oath into the record.

THE COURT: Well, why don't you just give it to Rose and she can copy it into the record.

MR. SHAUGHNESSY: Okay. I know it is an exhibit and it speaks for itself, but I just wanted it in the record.

THE STORMTROPPER'S OATH

I am a Nazi Stormtrooper. I am a soldier of Adolf Hitler and of the Aryan race of man, and I hereby make the following solemn vows:

To my country, the United States of America, I pledge my reverence and my respect [1550] for her Constitution as laid forth by the founding fathers of our nation;

To the National Socialist Party of America, I pledge my obedience and my service in the struggle for White freedom;

To my National Socialist comrades, I pledge my loyalty and my unswerving devotion;

To my fellow White brothers and sisters, who will hate and persecute me because they have been so cruelly brainwashed, I pledge my patience, and my love;

To myself, I pledge a clean and manly life of honor;

To the enemies of my people and my country, I pledge swift and merciless justice when the great day of National Socialist victory comes;

These things I swear upon my most solemn oath, by all that I hold sacred, in the presence of my loyal comrades gathered here.

Heil Hitler!

(Recess had.)

- - - -

[1551]

THE COURT: All right. You may be seated.

You may resume your examination, Mr. Shaughnessy.

MR. SHAUGHNESSY: Thank you, sir.

BY MR. SHAUGHNESSY:

Q. Just a couple more questions, Frank, so if you will bear with me.

You've seen, at least brought into the courtroom, the black suitcase and the brown zipper bag and the other kind of a letter bag. All right, those are your bags, aren't they?

A. No, one is, but two aren't.

Q. All right.

A. Those are my things in them, however.

Q. The things that are in the bag, it's fair to say those are your things, right?

A. Yes, sir. I assume so, I haven't looked through all of the bags, but the last time I saw them they were in order.

Q. All right.

Are you somewhat of a collector? Do you collect things?

A. Sure.

Q. You make scrapbooks when you collect things?

[1551] A. No, I just collect them.

Q. All right.

Is it fair to say that the things in the bag and the boxes, those are things that you have collected,

you have done that over some period of time?

A. Years.

Q. All right.

And these are things, these things, at least these things, you felt worth saving and you saved them?

A. Sure, they are valuable.

Q. They are valuable.

And tell the jurors why they are valuable?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. But anyway it is something you want, right?

A. They mean a lot to me.

Q. They are your things?

A. Yes.

Q. And you wanted to keep them?

A. Yes. I would like to have all of them back, if I can.

Q. Now, Frank, you heard the detectives, or I guess it was the police sergeant that sat out there that Saturday morning on 53rd Street when they arrested you; do you remember that day?

[1553] A. Yes.

Q. The first Saturday morning in September, wasn't it, a year ago?

A. Well, beginning of the Labor Day weekend.

Q. Nice hot summer day?

A. It was cool in the morning.

Q. Cool in the morning?

A. Cool but not cold.

Q. It was cool.

A It was cool. It wasn't cold.

Q It wasn't cold, it was the summertime?

A. Oh, yes.

Q. Now, you heard some people talking about somebody firing a gun out of the window, right?

A. Sure.

Q. Now, who fired the gun out of the window?

A. I did.

Q. Which one of the guns or rifles or shotguns or whatever did you fire out of the window?

A. Three of them.

Q. Which three were they that you fired out of the window?

You can just tell us, you don't have to point them out.

A. The Derringer pistol.

[1554] Q. The Derringer, that's the .38 two-shot over and under?

A. The .22 pistol.

Q. Well, let's talk about, let's take a minute to talk about the Derringer.

Did you have that loaded with real ammunition, you weren't shooting blanks?

A. No.

Q. Did you have those hollow pointed or those

jacketed bullets?

A. No.

Q. What kind of ammunition did you have In the gun?

A. I put the wad cutters in it.

That's the kind you use for shooting at paper.

Q. Wad cutters?

A. Yes.

Q. That's a target ammunition, target shot?

A. Yes. That's the least amount of damage.

Q. On that Saturday morning in September, the beginning of Labor Day holiday when you shot out the window and when you put the wad cutters in there, you weren't trying to kill anybody that morning, were you?

A. No.

Q. Why did you fire the gun out the window?

A. Well, I wasn't alone. I had company.

[1555] I wanted to show my company how the guns worked.

Q. Now, your company was a little girl by the name of Beverly Murphy?

A. Yes.

Q. And Beverly Murphy is a young girl?

A. 19 or 20 years old.

Q. 19 or 20, and she lived over on Nelson Avenue?

A. Yes.

Q. And you kind of wanted to show her how the gun fired?

A. Yes.

Q. You were pretty good at firing guns?

A. Well, I don't know if there was any skill involved, just open the window and shoot.

Q. Almost anyone then could open the window and shoot because there is no real skill involved.

A. Shooting at the sky.

Q. Is there any skill involved when we get down to actually killing people?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. But in any event, you wanted to show your company, young Beverly Murphy, how the gun worked?

A. Yeah.

Q. So you took the Derringer and you did what?

A. Opened the window and shot it out the window.

[1556] Q. All right.

Now, when did Bev Murphy come to your home on East 53rd Street?

A. On Friday night.

Q. On Friday night.

And she stayed for the whole night then?

A. Yes.

Q. All right.

She slept there at your house?

A. Yes.

Q. All right.

And did she sleep with you at the house?

A. Sure.

Q. All right.

And did you invite her there to sleep with you?

A. No, she came on her own.

Q. Did you know she was coming?

A. It was a little bit of a surprise. She used to drop in from time to time, you know, unexpectedly.

Q. All right.

How long did you know this Bev Murphy?

A. One or two months.

Q. All right.

And she kind of surprised you, or stopped in [1557] every once in awhile?

A. Yes. Sometimes she would call ahead of time and say, "I'll be there."

Q. All right.

And when she would surprise you, or when she would drop in, call ahead of time, what would you do, Frank?

A. What do you mean? What would I do?

Q. What would you do with Bev Murphy?

Would you shoot guns?

Would you have something to eat? What would you do?

A. Listen to music, watch TV, or she would take me out for something to eat.

Q. All right.

You were good friends then?

A. Sure.

Q. You liked Bev Murphy a lot, didn't you?

A. She was a good person.

Q. All right.

And were you boyfriend or girlfriend, or were you kind of – what do the kids call that – did you just like somebody like a brother, I forget how they call it.

A. We were more like a boyfriend and girlfriend.

Q. More like a boyfriend and girlfriend.

When she would come in the house, would you give her a kiss hello?

A. Yes.

Q. All right.

And would you kiss her goodbye?

A. Yes, I think so.

Q. All right.

Now, did you –

A. Not always, because a lot of times she left while I was still sleeping.

Q. I see.

Well, if you kissed her hello, and if you kissed her goodbye, did you get around doing any kissing in between those times?

A. Sure.

Q. All right.

And you were boyfriend and girlfriend and you liked her a lot?

A. Sure.

Q. All right.

Now, do you know what a paramour is?

A. Paramour?

Q. Yes. What's a paramour?

MR. NUGENT: Objection.

[1559] THE COURT: Overruled.

Do you know what it is?

THE WITNESS: I don't really know, no.

Q. But anyway, tell us about how many times had Bev Murphy come to your apartment?

A. About 20 times maybe.

Q. About –

A. Maybe more.

Q. About 20 times. You used –

A. She used to come and go quite a bit. I couldn't count them all.

Q. Do you remember the testimony she lived over on Nelson Avenue and that's over on the other side of town, or the southeast side of town?

A. Sure, I knew she lived there.

Q. That's quite a ways away, isn't it?

A. Oh, I think it is about three or four miles as the crow flies.

Q. All right.

And since we don't go as the crow flies, it's a little bit more if you had to drive or walk?

A. About five.

Q. How did Bev Murphy get from her home on Nelson Avenue to your home on East 53rd?

[1560] A. She had a car.

Q. She had a car and drove herself then?

A. Sure. She was mobile.

Q. All right.

On that Friday night, whatever day it was, the 4th or 3rd, or whatever, did she call you and say, "Hi, this is Bev and I will be over and we will listen to records, or something"?

A. I don't think so. I think she dropped in kind of unexpectedly.

Q. Now, you weren't working at that time, were you?

A. No, I was not working.

Q. And you were home alone?

A. Almost every day.

Q. Okay.

And what were you doing when you were home alone when Bev Murphy came, if you remember?

A. I had all my guns out on the coffee table. They were all out and I had them all taken apart and I was cleaning them and I was boiling them, taking care of them.

Q. You like to take care of your guns?

A. Helps me to pass the time away.

Q. All right.

[1561] How do you feel when you are shooting the guns, or cleaning the guns? Do you feel good about that?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Well, do you like your guns a lot?

MR. NUGENT: Objection.

THE COURT: Come on up.

(Thereupon, a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

Q. Now, Frank, I forget what day it was, but it was like the 2nd or something like that of September, the Friday night before the Labor Day holiday. Right?

A. Yes.

Q. And you were cleaning your guns and you had all your guns laid out there on the coffee table. All right.

The .38 and all the numbers and kinds that you told us about. All right.

Back then that night how did you feel about your guns?

MR. NUGENT: Objection.

THE COURT: Overruled.

[1562] THE WITNESS: I liked them very much. I was very fond of them.

[1563] Q. Now, that night, did you like to hold the gun and feel the gun and get the sense of the gun?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Well, what did you like about the gun?

MR. NUGENT: Objection.

THE COURT: Overruled.

Q. Well on September --

A. I live everything about them.

Q. You like to feel – you like the feel of the guns?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Well, tell us what you did with the guns you liked the most? What is the gun you liked the most?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. Well, the one I liked the most was my 9 millimeter and I kept that always oiled and ready to shoot in the box that I bought it in.

Q. Now, Frank, the question was, what did you like most about the guns?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I like most about them?

Q. Yes.

[1564] A. Well, they were neat. I don't know. I just liked them.

Q. You liked the guns?

A. Sure.

MR. NUGENT: Objection.

THE COURT: Overruled.

A. That was the best way.

Q. Tell us about the best part back then.

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. Well, sometimes I used to go over by myself or with Reddish and I would take my guns and we would go to some deserted spot down by the railroad tracks and we would set up a target like big cans and bottles and plastic jugs and we would shoot at them from different distances, 25, 50, 75 feet; we were trying to hit them.

Q. Now, Friday night. It's Friday night, the Friday night before Labor Day, the holiday weekend and you picked up your gun; what did you like about that then?

MR. NUGENT: Objection.

THE COURT: Overruled.

Q. How did you feel when you picked up that gun --

THE COURT: Now, there's a [1565] question before the witness already.

Can you answer the question?

THE WITNESS: I am trying to to the best of my ability, if the Court will allow me.

I felt like I had the power of God in my right hand.

Q. You are right-handed, Frank?

A. Yes.

Q. Did you put that gun in your right hand like this (demonstrating)?

A. Yes.

Q. And what did you feel when you squeezed your hand around that grip?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. I don't know. I can't tell you that. I can't tell you what I felt.

Q. How did you feel when you squeezed your finger on the trigger and the gun went off?

A. Powerful feeling, you know.

Q. Who gave you that power?

A. God gave me that power when I was 30 years old, that's when I got my first weapon.

Q. And did you spend the night with Beverly Murphy?

A. Sure.

[1566] Q. Did you sleep with Bev Murphy that night?

A. I guess so.

Q. Did you like Bev Murphy that night?

A. Sure.

Q. Did you make love to Bev Murphy that night?

A. No, I don't think we did.

Q. You like Bev Murphy as well as your guns?

A. No, not that much.

Q. But you do like Bev Murphy a lot?

A. Sure.

Q. Frankie, what color is Bev Murphy?

A. Black.

MR. SHAUGHNESSY: We have no further questions.

THE COURT: You may inquire.

[1567]

CROSS-EXAMINATION

BY MR. NUGENT:

Q. Bev Murphy has given you money, hasn't she?

A. A little bit from time to time.

Q. You use her for the purposes that you want to use her, don't you?

A. We use each other.

Q. She gives you money; you don't give her money?

A. I did at some time.

Q. You weren't working at that time, were you?

A. No.

Q. She was working, wasn't she?

A. Yes.

Q. How did she earn her living at that time?

A. She was a hooker.

Q. And you thought you were going to be her pimp, didn't you?

A. I don't know about that.

Q. Well, you thought you were going to be a pretty big man.

You told Reddish you and Reddish were going to use Bev as a prostitute and Reddish's girlfriend as a prostitute, didn't you?

A. No, I don't think so.

Q. Reddish had a black girlfriend, too, didn't he? [1568] A black female?

A. Yes.

Q. And he and you profited, and when I say profited, you had Beverly go out on the street and sell herself and part of that money she would give to you?

A. If she chose to.

Q. The question is part of that money she would give to you and you took it?

A. Sure.

Q. So you loved her for what she could give you?

A. No.

Q. She gave you money and you were not in love with her – withdraw that.

You like her for what she could give to you?

A. In what way?

Q. She gave you money, she gave you companionship?

A. Sure, she did.

Q. And the same reason you loved your guns or you liked your guns for what they gave you, correct?

A. I don't know.

Q. And everything is not what you can give to someone else, it's what people can give to you and what you can take from people, isn't that a fair statement about you?

[1569] A. Absolutely not.

Q. Well, when we talk about you blaming – you say that God is the person that is guiding your life, correct?

A. Sure.

Q. You as an excuse or a reason for your conduct blame someone else, the Nazi belief, you say that belief or those philosophies caused you to do the things that you have done?

A. They don't cause me to do anything.

Q. Your decision causes you to do it, is that right, to kill these people or to shoot them and –

A. Well, that's –

THE COURT: Well, just a moment. You have asked him a question; give him a chance to answer the question.

Q. Well, it was your decision that was made, correct?

A. I made a decision, that's true.

Q. God didn't force you to make that decision, did She, or did He, for that matter?

A. He doesn't force anyone, but he gave us the opportunity to make the decisions.

Q. So when you say –

A. And it is upon us to decide to do something or [1570] not to do it.

Q. And you talked about God's will. You have a free will, don't you?

A. We have a free will.

Q. You have a free will.

A. Everyone has a free will.

Q. My question is, you have a free will, don't you?

A. Of course.

Q. So if you decide to answer my question, either you do or you don't, that's your exercise of free will; isn't it?

A. Sure.

Q. So your answer, "Sure," was your exercise to free will; correct?

A. Sure.

Q. If God wanted you to answer sure, it wasn't him that made you say sure, isn't that correct?

A. Well, according to the Bible –

Q. I'm not asking you according to the Bible, I'm asking you according to you.

THE COURT: Here. Just a moment. Give him a chance to answer.

Q. When you answered "Sure," that's you talking, isn't it?

[1571] A. It's the Holy Spirit in me talking.

Q. It's your voice, is it not?

A. It's my voice.

Q. It's your decision that you made to answer the question?

A. And the Holy Spirit is giving me the words to

answer your questions.

Q. It is your decision to make – you think something is funny here?

A. Where?

Q. Are you smiling –

THE COURT: Put a question.

MR. NUGENT: I'm sorry, Judge.

Q. It is your decision to make to answer the question, correct?

A. Answer your question; I have answered your question.

Q. Now, you stood up before this Court and this jury and you took an oath, did you not, before you began to testify and you took the oath to tell the truth?

A. Sure.

Q. The whole truth, and nothing but the truth so help you God?

A. Sure, and I have done that.

[1572] Q. You have done that?

A. Absolutely.

Q. You have told this jury a lie, then, everything that you have told this jury you don't believe in the oath, correct?

A. I have not told any lies.

Q. All right. You told this jury I think on Tuesday that the reason you killed or shot at John Hardaway was because you read in the paper, you heard in the news media or on television that two white girls from a disco were attacked by a black

male and taken down in the Flats and one was shot and killed and one was raped; wasn't that your testimony?

A. I read that after John Hardaway got shot.

[1573] Q. Oh, now, it's after John Hardaway got shot?

A. Maybe you better check the transcript for errors, omissions and insertions.

Q. Did you say to this jury last Tuesday that the reason you went out and killed was you had to kill one for one, an eye for an eye, words to that effect, because what a black man had done to those two white girls, that's what you read and went hunting?

A. Those things happened all the time.

THE COURT: Just a moment.

THE WITNESS: That happened to those girls.

THE COURT: Mr. Spisak, try and answer the question.

Ask the question.

Q. Isn't that what you told us Tuesday?

A. What I told you Tuesday is that blood atonement must be made for these things that are happening.

Q. Mr. Spisak, I'm sorry if I'm confusing you. Please let me know.

A. You are.

Q. Didn't you tell this jury that you read in a newspaper, you heard in the media, that two white girls from a disco were attacked by a black man, taken down to the valley, one girl was shot and killed

and the other one raped, and they [1574] had to go through trauma, whatever your words were?

A. Sure.

Q. And because of that you and Reddish went out looking for someone and you went looking for John Hardaway?

A. I read that in the newspaper.

Q. Did you tell the jury that's the reason you went out looking for John Hardaway?

A. That's the reason, correct.

Q. That simply is not the truth?

A. It's the truth.

Q. Because those two girls were found the following day, you read that after John Hardaway was shot?

A. Both incidents happened the exact same time.

Q. The incident happened to the girls later Friday night, that certainly wasn't on TV because they weren't found until Saturday, June 5th, in the afternoon. Wasn't on TV until Saturday night.

A. The article about the girl was in the paper before the article about John Hardaway was.

Q. That wasn't my question.

A. As a matter of fact, it was front page news, very big, you know.

Q. But the media, or anybody, didn't find the girls until after you had shot John Hardaway?

A. That's probably true.

[1575] Q. You told this jury that's the reason you went out after John Hardaway, that simply isn't

true?

A. You are twisting –

Q. You told –

THE COURT: Just a minute. Try and answer the question.

Put another question.

Q. You told us you were born in Cleveland Heights and you had a mother and father?

A. Sure.

Q. And were you the first child, second child, what number were you in the family?

A. First.

Q. How many brothers or sisters did you have?

A. Two sisters.

Q. Are they both alive?

A. Sure.

Q. They lived in the family home with you until you left?

A. Yes, they did.

Q. When you were brought up, your father gave you food, clothing, shelter, your mother gave you whatever a mother would do, love and companionship, friendship, and took care of you as a child; did she not?

A. Sure.

[1576] Q. They took care of you when you lived over on Buckeye Road, didn't they?

A. Yes.

Q. They took care of you, fed you, clothed you,

everything there, kept you safe from harm?

A. Absolutely.

Q. And then when they decided to move out to Parma or Parma Heights –

A. Yes.

Q. They went our there, they took you, they took your family, because – for whatever reason, but there were newer houses out there, they were in a different community?

A. A different community, good word to use.

Q. Newer houses?

A. Newer houses.

Q. Maybe a little bit more expensive than Buckeye Road?

A. Whatever the case may be.

Q. Maybe a little bit more house?

A. New cars are more expensive that used cars.

Q. So your parents went out there, took you for what, hopefully, would be a better life?

A. Definitely a better life.

Q. What was that, 1955?

A. 1955, yes.

Q. Now, during that time, Christmas would come, your [15776 parents would give you Christmas presents?

A. Sure.

[1578] Q. You would buy little presents for your family or friends?

A. I had no money to buy any presents with.

Q. You eventually did get money as a child?

A. Sure.

Q. You would buy presents?

A. Absolutely.

Q. You went to school?

A. Of course.

Q. You went to church, didn't you?

A. Sure.

Q. You parents took you to church, they raised you a Catholic, didn't they?

A. Yes.

Q. And you felt, at least, at some time in your life you were a good Catholic?

A. Sure.

Q. Followed the teachings of the church?

A. Yes.

Q. Did you ever go to a Catholic school?

A. No.

Q. In high school, you went to Midpark High School, didn't you?

A. Yes.

[1579] Q. Do you know a young lady by the name of, I believe, Rose Nuendowski, Nuekowski, something that that?

A. The name doesn't ring a bell.

Q. You remember a young lady you – you said to Mr. Shaughnessy you never went to school with a black person?

A. That's true.

Q. There did come a time though you began to dislike black people while you were growing up, didn't you?

A. Dislike? I don't think that's the appropriate word to use.

Q. There came a time when you felt they weren't as good as you were?

A. In what way?

Q. In any way.

A. Well, if you mean did I at some point in time accept the belief that the whole white people were superior, most certainly.

Q. All right.

During high school, then, there was an incident, was there not, where one of the girls had a black boyfriend?

A. I don't remember that.

[1580] Q. You don't remember.

A. As I said, there were no black people out there where I went to school.

Q. Do you remember going to school – withdraw that.

That you were in high school and a young girl had a black boyfriend and you told her not to ever bring that man back?

A. That incident never happened. That was manufactured by the news media people for propaganda purposes.

Q. When was that manufactured?

A. At the time of my arrest that article appeared in the Plain Dealer.

Q. So someone manufactured, there is no young lady who had a black boyfriend and who now is known as Marion Polk, or her name was Marion Nuenkowski, wasn't it?

A. I never knew any person by that name.

Q. Do you remember a Jewish girl that went to Midpark High School?

A. Give me a name.

Q. Marion Nuenkowski.

A. I never heard of it.

Q. The incident where a young lady had a black [1581] boyfriend and you said never bring that nigger around?

A. Absolutely not.

Q. You didn't have that feeling in high school?

A. The incident you are referring to never happened.

Q. I said you didn't have the feelings against black people that you now have in high school?

A. My attitude was in the germinating stage at that time. The seed had been planted.

Q. Was the seed planted when somebody robbed you, or held you up?

A. No.

Q. You just had a seed planting by reading something here?

A. Of course.

Q. And in high school you still went to church, didn't you?

A. Yes.

Q. What church were you a member of?

A. St. Bartholomew.

Q. And that was in Middleburg Heights?

A. Yes.

Q. What parish are you a member of now, or before your arrest?

[1582] A. It was St. Vitas parish.

Q. You were a member there and went to church?

A. Yes. I gave them money, too.

Q. You considered yourself a good Catholic, didn't you?

A. Yes.

Q. And you feel that Adolf Hitler considered himself a good Catholic, don't you?

A. Absolutely.

Q. Because Adolf Hitler even at some point while he was the head of Germany stated that he was a good Catholic and felt that he was?

A. He concluded the best concordat with the church with anybody in Europe until this date.

Q. There was something, wasn't there, after Hitler came in power after 1933 where he made an agreement concordat with the Vatican, didn't he?

A. Yes.

Q. The Vatican agreed not to interfere with politics and he agreed to let the church do what they

wanted to do in Germany?

A. That would appear to be the agreement they had made, yes.

[1583] A. Yes.

Q. And one of the things that Hitler did after he made that agreement with the Pope was to suspend the civil rights to the Jews and banned – or not banned, but boycott their business?

A. I think the church was in complete agreement on this.

[1584] Q. Whether they were in agreement, they didn't do anything to stop it, did they?

A. No, they did not.

Q. And you read about that and that's part of your belief now?

A. Indeed.

Q. That the Catholic church, at least had some agreement with what the Germans were doing in 1933?

A. Well, you know, there was an article.

Q. Can you answer my question?

A. I'm going to answer your question.

Q. Were –

A. There was an article that appeared in the Plain Dealer on the 50th anniversary of Hitler's rise to power, which was in January that just passed, and the headline was something like, Catholic church blamed for Nazi guilt, or something like that, and it was all about what we are talking about, about the church did not do anything to help the Jews.

Q. And you felt as a good Catholic that the concordat that was made between Hitler and the Pope was proper?

A. Of course it was. The Pope considered it proper, or he wouldn't have made it.

Q. In 1935 and the Nurenberg laws and the church did nothing to stop the Nurenburg laws that year?

[1585] A. Indeed.

Q. The Jewish citizenship was revoked and they weren't allowed to own land or go to school or own property or to marry out of their religion or to have any relations with anybody that wasn't Jewish?

A. Yes.

Q. And you agree with that?

A. Of course.

Q. And of course at that time there was a majority of German people in agreement with that?

A. Sure.

Q. Because you have to agree the Germans were attempting to blame someone for their misfortune in the World War I and inflation, whatever it was, they blamed and put the blame on someone and they went along with your friend, Adolf Hitler, blaming the Jews?

A. The Jews were guilty.

Q. The point is, they blamed the Jews?

A. They got the blame they deserved.

Q. And they got a receptive audience to that, didn't they?

A. Yes, sure.

Q. And in 1935 Hitler was teaching and the church felt, communist, Jews were anti-Jesus, didn't they, godless communists?

[1586] A. That's right.

Q. Communists is godless?

A. Communism, the word means political conspiracy and anti-Christ, that's what it is.

Q. That's what you believe and you know that millions of people believe that, at least at that time?

A. Of course.

Q. And during that period of time, of course, there were innocent people, innocent store owners, shopkeepers, school teachers, civilians, railroad workers, being hauled off, deported, being shot and arrested, and being shot and tried without a jury; you know that was happening?

A. I don't know about being shot and tried without a jury.

THE COURT: Approach the bench.

(Thereupon, a sidebar discussion was had between Court and counsel on the record and out of the hearing of the jury as follows:)

THE COURT: I'm going to stop this. His beliefs, obviously, are his beliefs, they are relevant to this case, but on the other hand it seems to me that what he believes about what happened in Germany during the time Adolf Hitler had power, I [1587] just don't see the relevancy. And you know, if you want – you know, it just seems too inflammatory to me.

MR. NUGENT: My only point is to demonstrate, you know, he is not alone, they are

trying to say he is crazy, there are millions of people that believe like he does.

MR. SHAUGHNESSY: We don't object, Judge. Whatever Don wants to do.

THE COURT: I'm going to stop you.

MR. McGINTY: It's quite interesting.

(Thereupon the following proceedings were had in open court and in the presence and hearing of the jury:)

BY MR. NUGENT:

Q. You would agree then when the Germans went into Austria, the cardinal Vatican gave Adolf Hitler a silver cross, didn't he, that he was brave, the German people were taking over the country?

A. I didn't know about the silver cross in particular, but I know they were received with enthusiasm and joy.

Q. And, of course, all during that period of time there [1588] were human beings being persecuted and being unjustly attacked; were there not?

A. Were they being unjustly attacked?

Q. You know, about the crystal night? That was in what year, when all the Jews, their stores were ransacked, they were beaten in the street and the police did nothing to stop it?

A. The windows were broken, that's why they called it a crystal night, not a hair on the Jews' head was hurt.

Q. You agreed with that and you read about that and you studied that; have you not?

A. Sure, I read that.

Q. And you can agree, the German people or at least people other than the Jews in Germany are people who were not attacked used the Jews to blame them for their faults?

A. They had no faults.

Q. And you have studied that, you joined the party in 19—or attempted to join the party in 1970?

A. Sure.

Q. You finished high school and your parents took care of you, correct?

A. Sure.

Q. Up to that point you were 18 years old, you finished high school, you didn't have to work because your farther gave you money and your parents gave you a home?

[1589] A. I worked when I was living at home and I paid room and board to my parents.

Q. In high school your parents gave you money and your parents gave you a home, didn't they?

A. They gave me a home, they did not give me money.

Q. Did there come a time after you graduated from high school that you moved out of your house?

A. Yes, I did.

Q. When was that?

A. 1970, October of that year.

Q. All right.

And you were what, 19 years old then?

A. Yes, I think I was.

Q. Did you have a job?

A. I worked as a dishwasher in a restaurant.

Q. You had a hard time keeping jobs, haven't you?

A. No.

Q. Well, you were unemployed when you were arrested?

A. Not my own fault.

Q. Of course, I know it wasn't your fault. Blaming someone again, right?

A. The economy is in a bad situation. There are millions of Americans out of work. You cannot blame them for being out of work. They want jobs and there are no jobs.

[1590] Q. In the last three years you tell us how many jobs you had?

A. One.

Q. I thought you worked at Case Bookstore?

A. I worked at Case Bookstore in 1970.

Q. Tell us in the last ten years how many jobs you had?

A. One, two, three, four, five.

Q. Tell us the longest period of time you spent at each job – at any job, excuse me.

A. Three years.

Q. So you have had varied jobs.

You have been on welfare a number of times, haven't you?

A. Just once.

Q. Wait a minute. Say that again.

A. Once.

Q. Well, you applied for welfare as Frank Spisak, didn't you?

A. Sure.

Q. You applied for welfare as Frankie Spisak, didn't you?

A. My name was changed, the records were changed.

Q. And you applied for welfare as Frankie Ann Spisak, didn't you?

[1591] A. Possible.

Q. So you had three names, at least, that you applied for welfare in?

A. It came a time when I had to.

Q. And you kept a number of different jobs, you had someone giving you money, Bev Murphy, and your parents, we can agree on that, can't we?

A. Say that again.

Q. I said Bev Murphy gave you money, your parents gave you money, and this community has given you money, welfare?

A. Money that the community has given me on welfare is money that I paid in my taxes when I was working.

[1592] Q. Now, 1970 you said you moved out of the house.

When did you meet your wife?

A. 1973.

Q. So you had been out of the house for three years, since '73?

A. Yes.

Q. You have been a homosexual from 1970 to 1973?

A. No.

Q. You met your wife and you eventually – well, you knew her for a few months and then you married her, correct?

A. Yes.

Q. When did you move on East 53rd Street?

A. Immediately.

Q. So you lived there in the beginning of the marriage?

A. Yes.

Q. After you married your wife was pregnant in a short time, is that correct?

A. That's correct.

Q. She had a baby?

A. Yes.

Q. And during that period you were married, you said that you kind of went away from your Nazi beliefs [1593] or you didn't do it outwardly?

A. Well, I was no longer active in the Party.

I paid more attention to my family and my job.

Q. So at that point you had a steady job, you had a family.

A. Sure.

Q. So everything was going okay for you?

A. Sure.

Q. There was no Jews to blame, no blacks to blame for any of your miseries or any of your problems, is that fair?

A. Jewish problems and the black problems were still there but perhaps I was putting my head in the sand and not paying any attention to it.

Q. Well, perhaps you were working and had a job and a wife and a child, and you were happy?

A. That's usually the case.

Q. So you didn't need anyone to blame for any of your troubles, you didn't have any troubles?

A. Well, I still had troubles, I still had bills to pay.

Q. Then there came a time during your marriage when you and your wife were having problems?

A. Sure, a number of them.

[1594] Q. And one of the problems certainly was that you wanted to go out and be with other men?

A. Sure.

Q. And your wife didn't like that?

A. No.

Q. Your wife didn't want you do that, correct?

A. Right.

Q. And certainly if your child would have known, she wouldn't have wanted you to do that?

A. Sure.

Q. But you chose to do what you wanted to do regardless of what your wife said, you went out and

did it, correct?

A. There was something wrong with me. I was confused.

Q. All right. Somebody else caused you to be confused, I suppose?

A. Undoubtedly.

Q. So you went out and what you did is you went in the street corners sometimes and you tried to solicit men, wouldn't you?

A. Well, I was picked up by the police for that, but they never proved that case.

Q. Well, if you can tell us, weren't you out there trying to solicit the policemen for sexual acts?

[1595] A. That's what the policemen say.

Q. That's what the policemen say?

A. Well, you said –

THE COURT: Put another question.

Q. Well, nonetheless, you stood on the street corners and you tried to solicit men for sexual favors?

A. I was on the street, I'll tell you that.

Q. So when you talked about Reverend Rickerson at the Cleveland State, you certainly were aware of what the hole was, what the rest room was used for because that was the kind of conduct you engaged in?

A. Not all the time.

Q. You say not all the time, but you have engaged in this conduct?

A. Well, not on that date, I didn't. But I was aware of what was going on there.

Q. When you say the Bible says that punishment for homosexuality, it doesn't mean anything to you, it doesn't apply to you, does it?

A. Well, it applies to everybody.

Q. Well, it didn't apply to you because you haven't been killed because of your homosexuality?

A. Well, not yet.

[1596] Q. And certainly your belief in God and your belief in God is an all forgiving God?

A. Yes, he is.

If it is God's will for me to die in my sin, then he would have arranged for it to happen.

I have been shot at a number of times, at different times, and it is only through miracles that I survived.

Q. You were jumped three times by three different black people, is that correct?

A. Yes, that's right. They put guns to my head and it happened three different times.

Q. You told Alice Davis about that?

A. Yes.

Q. And indeed Alice Davis was another young lady you used because you had her stay at your house and you used her for whatever purpose you wanted, you used her for whatever purpose you wanted to?

A. Perhaps we used each other.

Q. And you told her you didn't like black people because three black people had jumped you, three black men had jumped you and you didn't like this and this made you angry?

A. Well, nobody likes it if they would get jumped and nobody likes it if they get shot and certainly [1597] Alice didn't care for black people either.

Q. And that's why you told her you killed Reverend Rickerson because he was a queer and that you had to kill two more because of the three black people that jumped you, that's true, isn't that right?

A. Well, that's true. There was three black people.

Q. You didn't tell Alice anything about the reason that you killed Reverend Rickerson was because you were a soldier in the Army or anything like that?

A. Well, she knew all about that.

Q. You didn't tell her that, did you?

A. She knew all about that.

Q. I said, you didn't tell her that was the reason why you killed Reverend Rickerson?

A. She knew all about it.

I gave her George Lincoln Rockwell's book to read.

Q. Well, you told Mr. Shaughnessy and you had a grin on your face, you accused the police about lying about this T-shirt, is that right?

A. Well, they did lie and there's no doubt about it.

[1598] Q. So there's no doubt about it the police lied about this T-shirt, Officer Budzik, Tim Patton, and the other officers that came in here and told us about this T-shirt, they lied?

A. Yes, they all lied.

Q. Well, you tell me the point where they lied.

A. Well, that officer, the one officer came in here and said that I asked him if he would give me a T-shirt, that they would take my T-shirt and that was a plain bold-faced lie because I put this shirt on deliberately because I knew I was going to jail.

Now, why would I go to jai and then I tell them I want them to take it off me?

That was a plain bold-faced lie. I put this shirt on deliberately.

Q. Well, where are the lieutenant bars, if you want to make sure you were in full uniform, where are the lieutenant bars if you want to be in full uniform?

A. Well, my lieutenant bars are over there. My lieutenant bars were packed in my belongings over there. That shirt contains a very powerful message.

Q. Did you want to go over to Reddish's house and make plans to be arrested and to be in uniform so all the followers would know who you are; [1599] I would certainly think that you would want to put your whole uniform on, your lieutenant bars.

A. Well, this is much more effective.

This is a much more effective uniform because it has the symbol and it has the slogan for what it stands for and anybody that has half a brain in their head who would see it would know immediately what's going on.

Q. So you deliberately didn't put your full uniform on?

A. Well, it's right over there.

Q. You didn't have the lieutenant bars on?

A. Well, as you and everybody else know, there's

different kinds of uniforms.

There's combat uniforms, the walkout uniforms, all kinds of uniforms, there's different kinds and you and –

Q. So Officer Budzik, Tim Patton, they lied about that, too?

A. Indeed they did, because I wouldn't give that shirt up.

They tried on successive days to get me to get rid of that shirt and I wouldn't.

Q. Well, you knew you were going to be arrested and that's why you said – that's when you saw the [1600] police you ran off like a scared rabbit and you ran over to Reddish's house?

A. Well, I wasn't impressed about that at the time.

Q. Well, you went to Reddish's home, you went to his basement and you crawled in the crawl space hoping to avoid detection, didn't you?

A. Well, I was hoping that they would pass me by.

Q. So you didn't know you were going to be arrested?

A. Well, there was a high possibility that I would be caught, there was a high possibility I would be caught, but I was hoping they would possibly pass me by.

Q. We know that your wife left and you were divorced in '78, or some part of '78, and part of the reason was you weren't a good provider, you were out having homosexual affairs and you couldn't satisfy her, there's no doubt about that either, is there?

A. Well, we already went into that and the reason for that.

Q. During that period I think you indicated to Mr. Shaughnessy that you had supported your wife and your child?

[1601] A. That's true, I did.

Q. And you know that's really not true either?

A. It is true.

Q. Well, do you remember making a tape recording to your wife and asking her if she would come back and sending that tape recorder to her?

A. I made a tape recorder, sure.

Q. And then she sent the tape recorder back with a tape on the other side and she said, why don't you instead of begging me to come back, why don't you start paying some support to your daughter and taking care of her?

A. Well, at that time I was paying support.

You can check my pay stubs because every week the money was taken out of my pay check and given to the Bureau of Support and she wanted me to put it in her own hands, but the Court said I wasn't entitled to put the money in her own hands, so I gave it to the Bureau of Support and they gave it to her.

Q. So I am a correct when I say you sent a tape recording asking your wife to come back and she said why don't you start supporting your family?

A. Well, I have a check and the records of the Bureau of Support and verify that and you can check my pay stubs because that's what I was doing and it's [1602] right there in my stub and I was paying $35.70 every week, and it was deducted for child support.

$35 and something.

Q. I don't think you understood my question.

A. I don't think you understood my answer.

THE COURT: Just a moment. Put

another question.

Q. Your wife said she was not coming back until you started supporting her child?

A. Well, she was on welfare deliberately. She was on Welfare purposely.

THE COURT: Just a minute, just a minute.

Can you answer the question? The question calls for a yes or no answer.

Did she say that, yes or no?

THE WITNESS: I don't know.

He can bring a tape recorder in here and play the tape.

Q. Didn't you listen to the tape when your wife sent it back to you?

A. Uh-uh.

Q. You didn't listen to the tape when your wife sent it back to you?

A. Sure, I listened, but I don't remember every [1603] word on it.

Q. Didn't she say she wanted you to support her and the child?

A. Well, it sounds like something she would say.

Q. And didn't she also say –

A. Well, if you want to find out the truth about it, why don't you bring a tape recorder in here and play it, and we can see if you're telling the truth.

Q. Your wife said that to you, didn't she?

A. Well, she was always saying that.

Q. Well, she was asking you to start supporting her and your child, you weren't supporting her the way she felt you should?

MR. SHAUGHNESSY: Objection.

THE COURT: Sustained.

THE WITNESS: I was doing all I was required.

THE COURT: Sustained.

Q. All you were doing was what the Court required you to do?

A. Indeed.

Q. And nothing more?

A. Why should I?

Q. It's your child.

A. She left me. She had a chance to come back [1604] and have a full home, a family and have all the benefits to go with it, but she turned it down just to be on Welfare.

Q. But that was your child?

A. My wife I'm talking about. I'm talking about my wife.

The child had nothing to do with it. The child was an innocent pawn in the game.

Q. So your wife didn't want to come back to you and it was her decision to be on Welfare and because it was her decision you felt you would only support her, you wouldn't pay her any more than the $35.00 a week for child support?

A. Absolutely. Until she showed signs of waking up, I was going to do the absolute minimum.

Q. You were doing the absolute minimum?

A. Yes.

Q. At some point she came back and you thought it was going to be a good marriage?

A. Yes, I did.

Q. But that didn't last very long?

A. Four months.

Q. And you tell us it was during that time or after she left that you took your BB gun or your Crossman rifle or whatever it is and you pointed it at [1605] her?

A. Well, it never happened at that time.

Q. Well, when did it happen?

A. That was years and years ago when we were first married. That kid might have only been a year old, maybe not even that.

Q. The what?

A. My daughter may not have only been a year. That happened a long time ago.

Q. But you had the bun then?

A. It was the BB gun.

Q. What did you do with the BB gun?

A. Well, we had an argument at home and I shot her in the stomach with the BB gun. I didn't do any damage.

[1606] Q. And then after 1980 pointed the BB gun and you threatened your daughter, her and your daughter, your daughter was in the other room, but this was after you started killing these people?

A. I don't remember that.

Q. Do you remember telling her you were going to shoot your daughter and then you decided not to?

A. I don't know about that.

Q. Did she come to visit you from the time you started the killing of Reverend Rickerson?

A. She would come every now and then.

Q. And you told her what you were doing, didn't you?

A. At one point in time, I did.

Q. And she tried to dissuade you or stop you?

A. I don't know if she could dissuade me or stop me.

Q. Well, she is the one who called the police, called Detective Budzik and said the one you arrested, the guy you arrested for the guns are the guns that were used in the killings?

A. Well, I don't know because it was an anonymous call. We can only assume.

Q. Now, you told your wife and your wife knew what the guns were being used for?

A. Well, it's possible.

Q. Well we knew it was a female that called.

[1607] A. There were any number of females who could have called.

Q. Well, Cathy Student knew you killed Reverend Rickerson?

A. Sure.

Q. And I think you told her you committed the

perfect murder, you couldn't get caught.

A. Sure. They was looking all over and couldn't find me.

Q. And that's what you felt was a perfect murder?

A. Well, no one knew who did it or why it was done.

Q. So you thought you wouldn't get caught for it, is that true?

A. Well, they didn't know who did it, no one knew why until I got caught and they really didn't know it was me, either.

Q. Well, that's not quite true either, is it?

MR. SHAUGNESSY: Objection.

THE COURT: Overruled.

Q. The police had your palm prints and your fingerprints insider the stall next to Revered Rickerson.

A. Well, that doesn't mean anything. There's a lot of palm prints and fingerprints in there.

Q. You didn't hear any testimony about that?

A. No. Why didn't we hear any testimony about the other [1608] palm prints or the other fingerprints?

Q. Well, it was your gun that was used.

A. I'm not arguing any of that.

Q. When you say the police didn't have any evidence, that's just not true, they had plenty of evidence, didn't they?

A. They didn't have enough to go on.

Q. Until your wife called and said you had the gun.

A. Well, gave them a little bit of a start.

Q. Now, sir, your wife came back and she left again and you were working?

A. Sure.

Q. There came a time in December of 1973 – excuse me, 1981 when you decided to buy some weapons, December 3rd, I think.

A. Oh, I bought one in August or July.

Q. You bought three guns from the gentleman who came in here and testified?

A. Yes, I did.

Q. Before that time you had only in your possession one weapon, correct?

A. Two.

Q. Which were the two guns then?

A. The .38 caliber revolver, five-shot. I had a semi-automatic rifle with 18 shots.

[1609] Q. Up to that point you hadn't shot anybody other than your wife?

A. I wouldn't consider that shooting because it was only a BB gun and no harmful intent done, no harm done.

Q. But you pointed it at her, you hadn't shot anybody but your wife up to that point when you pointed the gun at her?

A. Sure.

Q. But the guns, you bought the guns because according to what you told us the other day, because

you had been burglarized and you were afraid of being burglarized.

A. That's true.

Q. And you told us that was the reason you purchased the guns?

A. That was one of the reasons.

Q. And that you cut the book out so you could put your books on the shelf and the burglar wouldn't look in there and steal your book, steal the gun, that's true?

A. That's true. That's why I cut the book out.

Q. You had the shotgun, you got the shotgun from the man from the E.W. Daniel Company because that was good to use if a burglar would come in?

A. Indeed. Even the cops told me when I called them over to my house to look at my door they had busted down they said the next time you catch the guys, just shoot him [1610] and if you shoot him in the hallway, they said, just shoot him in the hallway and drag him in the house. That's what the cops told me and I was going to do it, too.

Q. And you armed yourself?

A. Yes, indeed.

Q. And you armed yourself in case somebody would come in?

A. Nobody ever came in.

Q. Nobody ever came in except the police?

A. That's right.

Q. You didn't have the nerve to shoot at the police because you knew they would shoot back?

A. I don't know about that.

Q. Well, we know you didn't shoot at them, is that right?

A. That's right.

Q. You didn't shoat the policemen?

A. That's right.

Q. You didn't shoot at them when they came to your house September 4th, we know that, don't we?

A. Well, they didn't have a warrant, either.

Q. You know they came September 6th and you had the weapons and you didn't shoot back?

A. When they came to my house on September 6th, I wasn't there.

Q. At Reddish's house you knew they were outside?

[1611]A. Sure.

Q. And just like Adolf Hitler with this yellow streak all the way down your back, when you saw them, you ran?

A. No. Adolf Hitler shot himself and I took the stand to testify –

THE COURT: Just a minute. Just a minute. Come up her.

(Thereupon discussion was had between Court and counsel off the record and out of the hearing of the jury.)

THE COURT: Put another question.

Q. You hid the hopes of avoiding detection on September 6th, didn't you?

A. Sure.

Q. And that's the same thing that happened in 1945, the person in there was shot and killed who wanted to avoid capture.

A. I wanted to continue my war.

THE COURT: Okay. Ladies and gentlemen, this is probably a good time to adjourn for the evening.

Now, remember you are not to discuss this case among yourselves nor with anyone else. Do not permit anyone to discuss it with you or in [1612] your presence. Do not form or express any opinion on this case until it is finally submitted to you.

Now, we have been here a long time. I want to readmonish you, you re not to read or listen to anything on television, read anything in the newspapers, radio or television on the subject of this trial. Do not permit anyone to read or comment upon anything about this trial in your presence.

Now, you must consider and decide this case only upon the evidence received in the courtroom.

If you should acquire information from an outside source, you must not report from the outside source to other jurors. You must disregard it in your deliberations. In addition, you should report the outside source of information to the bailiff or to the Court at the first opportunity.

Now, again, to be fair I want to caution you that I may be questioning you later on to find out if you have read, viewed or listened to anything, any reports concerning this trial contrary to my instructions.

Now, look – I'm going to stop saying that.

[1613] We will see you tomorrow morning at – Counsel, come up here.

(Thereupon discussion was had between Court and counsel off the record.)

THE COURT: We will see you tomorrow morning at a quarter to ten. Have a nice evening.

(Thereupon an adjournment was had until 10:00 a.m., Friday, July 8, 1983, at which time the following proceedings were had:)

[1614]

FRIDAY MORNING SESSION, JULY 8, 1983

- - - - -

THE COURT: You may be seated. Okay. Mr. Nugent, you may resume your cross-examination.

CROSS-EXAMINATION OF FRANK SPISAK
(Cont'd)

BY MR. NUGENT:

Q. Mr. Spisak, did you have the opportunity to review the transcript of your testimony last night?

A. Yes, I did.

Q. And did you determine from reading the testimony that what you had told these jurors on Tuesday was that your reason that you wanted to shoot John Hardaway was because of what happened to two white young girls?

A. I read something about that in there, yes, sir, I did.

Q. So when you told us yesterday you didn't say that, that was simply a lie?

A. No, sir, that was not a lie.

Q. Well, I will refresh your recollection.

Do you remember Mr. Shaughnessy asking this question on Page 119:

"Why when you saw a black guy on June the 4th, [1615] 1982 at 11:30 p.m. at West 117th and Madison, did you decide to go in after him?"

And your answer was, "Well, there were two white women that were down in the Flats at one of these disco places. I forget the name of the place, but

I heard, and I read in the newspaper, when they came out of the disco and they went to the parking lot to get in their car, a black guy had abducted the two of them at gunpoint and he force them in the car an one he raped and the other one he killed, he shot her."

That was your answer, wasn't it?

A. That's correct. That's true.

Q. "Does that upset you, Frank?"

Answer: "I figured there must be a blood atonement made for this crime."

That was your answer, wasn't it?

A. That's correct.

Q. Question: "All right."

"So I went in the Rapid Station, looked for the guy I thought I saw go in there. When I went in there, he wasn't there. I don't know where he went. So I came back out and I was going to get back in Reddish's car when I saw him come from across the street. He came out of the bar, the Black Horse."

[1616] Question: "All right."

"He went back in the Rapid Station then."

Question. "All right. Now, Frank, you said you felt there should be a blood atonement?"

Answer: "Sure."

"Tell the folks here, if you will, what do you mean by an atonement, or a blood atonement?"

"Well, the death of those, the death of that one white girl, and the other one who was raped, she suffered terrible trauma at the hand of this animal."

A. That's true.

Q. "Something had to be done about that. If more people would do more things about it, this kind of stuff wouldn't go on."

A. That's right.

Q. That's what you testified to yesterday?

A. That's absolutely true, 100%.

Q. And you didn't know –

A. Will you allow me to answer that?

Q. Answer my question, please.

You didn't know about the fact that those girls had been abducted, one shot and one raped, until the day after you shot John Hardaway?

A. No, sir, that's incorrect, because these kinds of things are happening all the time, daily. [1617] When we are talking about the state of war that existed between the black and white people, we are talking about the guerilla warfare that has been going on, not only through this city, but throughout the land for the last 20, 30, 40, 50 years. And that was just one of the examples of the kinds of warfare that these animals are waging against these people that I decided a blood atonement must be necessary and paid for.

[1618] Q. Frankie –

A. My name is Frank to you, buddy.

Q. The name is whatever I want to call you.

MR. SHAUGNESSY: Objection.

THE COURT: Sustained.

THE WITNESS: Let's keep it civil.

Q. You talked to the police and after you talked to the police, or rather you wouldn't put in writing everything you told the police because what you put in writing, you said you told them everything and it was up to the prosecutor t prove whether or not you committed the crime or not; do you remember that?

MR. SHAUGNESSY: Objection.

THE COURT: Overruled.

Q. In your statement to the police you said:

"I have already told the officers everything that I know. Much of this information is public knowledge. I am ready to accept the burden of guilt for these acts and if so doing admit I acted alone and absolve any others from any involvement.

"However, as to particular charges and details, I will leave it up to the police department to prove or disprove otherwise."

That's your written statement, wasn't it?

A. Sure, it is.

[1619] Q. So you told the police officer a bunch of things orally and they came in here and testified and you listened to what they testified to and then you decided what part you thought you said and what part you thought you wanted to change.

A. That's not true.

Q. But you couldn't change what you testified to on Tuesday, and that is when Mr. Shaughnessy asked you what was the reason you went after John Hardaway, your answer was because those two white girls and that simply is a lie.

A. It is not a lie.

If you look in the transcript on Page 150 about

three-quarters of the way down the page, it stated, and it's in the transcript that John Hardaway met his death and we know that's a lie because John Hardaway walked in this courtroom and he took the stand and he testified, and he couldn't have done that if he was dead.

Q. We know you are trying to put something over at least your ploy is to give your message or to say what you want to say to these people and not be rebutted or contradicted by other people; isn't that a fact?

A. It cannot be rebutted or contradicted, it's the truth.

Q. You want these people on this jury to feel you are a [1620] firm believer in Naziism when that really isn't the case either.

A. Can you prove that's not true?

Q. Well, when you were arrested, we have a photograph taken of you, and photos don't lie, and this was taken 9/6/82 or 9/7/82 and when you were arrested you didn't have your funny moustache and your funny hair the way it is cut now and –

MR. SHAUGHNESSY: Objection to "funny moustache."

THE COURT: Sustained.

Q. The question was, the picture was taken of your hair and your hair wasn't the way it is now, and your moustache, it wasn't the way as it appears in this courtroom.

A. Well, that is irrelevant because actually in that photograph, if you take care to look at it, if you look at it plainly, you can see that I do have the T-shirt in question on and it's underneath this other T-

shirt and if my memory serves me, I think there are two photographs taken in the police station, and this is only one of the two. The other one shows me in the other T-shirt.

Q. I think my question was about your changing your hair and your moustache, that was my question.

A. Sire, I got this haircut in the jail and you have to [1621] settle for whatever kind of haircut you can get up there because they don't exactly have a boutique job up there in jail.

Q. And that's somebody else's fault that you look like you do?

A. Well, I told them I wanted my hair cut short and they cut it.

Q. Somebody cut your moustache like that?

A. I cut it that way myself.

Q. So these jurors will have some kind of a belief that you look like that –

MR. SHAUGNESSY: Objection.

THE COURT: Overruled.

A. Sir, my belief goes back 10, 15, 30 years and --

Q. Sir, your belief was put on the back burner or aside until you became an active homosexual.

A. That's not true.

Q. When you became an active homosexual, what happened with your wife, when your wife left you?

A. Well, we already went into that the other day.

Q Well, you started dressing like a girl and you tried to get your wife back, and you did whatever you could do to get her back and eventually she did come

back, but she didn't want to go through your homosexual practices.

A. Well, we talked about that going on. It's going on [1622] all the time, people are doing it. We talked about it going on and who is responsible for it going on.

Just in Boston, no longer than –

THE COURT: Just a minute. Just a minute. Put another question.

Q. Because you were a homosexual, your wife left you in 1980?

A. That's not true.

Q. When did you meet your pal, Ron Reddish?

A. I met him in '70.

Q. After your wife left you for the second time, you and Ron Reddish became pretty close?

A. We were friends.

Q. You became closer and your wife left you?

A. Well, I didn't know him before that.

Q. You didn't know him before your wife left you?

A. Well, I believe I did.

Q. I thought you just said you met him in '70.

[1623] A. Well, I mean it was '80.

Q. So you're mistaken about that?

A. Yes.

Q. So when your wife left you, you met Ron Reddish, is that fair to say?

A. 1980, not 1970.

Q. Your wife left you and then you met Rod Reddish?

A. Well, something like that.

Q. You and Ron Reddish became pretty close friends?

A. Sure, we had a lot in common.

Q. You both are homosexuals?

A. Ron is not a homosexual.

Q. Just you?

A. I am not one.

Q. How about your friend Richard Esto, you know him, don't you?

A. Yes.

Q. That's a friend of yours?

A. Sure. We met each other in the jail.

Q. There's no question Richard Esto is a friend of yours?

A. Yeah. I told you I met him in jail.

[1624] Q. There's no question you two are friends, aren't you?

MR. SHAUGNESSY: Excuse me, your Honor. Could we approach the Bench?

THE COURT: Sure.

(Thereupon a discussion was had between Court and counsel off the record and out of the hearing of the jury.)

Q. We can at least say this about your relationship with Mr. Esto, that you and he were friends and are friends and correspond with each

other?

A. We haven't corresponded lately.

Q. But you have written letters to him and he has written letters to you?

A. Of course.

Q. Within the last few months?

A. I write letters to a lot of people on the outside.

Q. Rich is not on the outside?

A. I write a lot of letters to people on the inside, too, Mr. Nugent.

Q. All right.

You met Mr. Reddish. Tell us how did you meet Ronald Reddish and where were you when you met him?

A. Ronald Reddish was a supporter, as I was, of the [1625] National Socialist White People's Party, and I met him through that organization.

Q. All right.

But my question was, where were you when you met Ronald Reddish?

A. I think the first time I ever saw him, I was at home.

Q. Did he come over to your house?

A. Another supporter of the Party brought him over.

Q. So there were more than you and Mr. Reddish, and you did have meetings at your house from time to time?

A. We did not have meetings, sir.

Q. Come over and chat?

A. Don't you go over to other people's houses and chat?

THE COURT: Hey, lookit, just attempt to answer the question that he asked you. Don't ask him questions.

THE WITNESS: That's what I'm doing.

Q. So Ron came over with another one of your fellow supporters and had some chat with you, that's how you met him?

[1626] A. Sure. Informal meeting.

Q. Meeting.

What is the name of the individual that brought Ron over to your house and introduced the two of you to each other?

A. I can't remember exactly who it was.

Q. Okay.

So you don't know who that was, but after the first meeting you and Mr. Reddish struck up a friendship?

A. Sure.

Q. All right.

And at the time that you and Ron Reddish had the friendship, you didn't have any guns, did you?

A. Yes, I did.

Q. Was this the .38, five shot revolver?

A. Yes.

Q. And that's the only gun, or did you have your BB gun or the .22 rifle at the time?

A. Yes, I would say those as well.

Q. So you had the BB gun, the .22 rifle and the five shot revolver?

A. Yes.

Q. And these were purchased in 1980?

[1627] A. Yes, I believe they were.

Q. And these were purchased as you have indicated for your protection, because your house had been burglarized?

A. That's true.

Q. And had you hollowed out the book yet to put the pistol in the book so the burglars wouldn't steal them?

A. Not at that point in time.

Q. And at that point in time, did you carry your .38 with you for protection when you walked to work and when you walked to Cleveland State, or whatever you did in 1980?

A. Yes, I did.

Q. All right.

And when you met Ron, you realized that he had the same interests that you did in guns?

A. Ron did not have any guns, but he became interested.

Q. Okay.

So you two talked about guns, you talked about your philosophy in the White People's Party and you became friends?

A. That's correct.

Q. And told him that you were having problems with [1628] your wife or domestic problems, fair enough, he understood that?

A. Sure.

Q. And at that time you still wanted your wife Laverne back?

A. Sure.

Q. But she wouldn't come back?

A. There were problems there.

Q. And that you were working at the E. W. Daniels Company making money?

A. Sure.

Q. That in December of 1981 is when you then decided, or then made the purchase of three guns, the .22 Erma, the .380 and the shotgun?

A. That's right.

Q. All right.

From the gentleman that you worked with?

A. Sure.

Q. And up to that point you and Ronald Reddish had not gone out on any hunting parties at all?

A. That's correct.

Q. Now, when you and Ronald Reddish would get together, how often would it be, once a week, once a month, once every two months? What would it be?

A. No regular pattern.

[1629] Q. All right.

You called him and he called you, however it would be, and you met and would go out?

A. Whatever.

Q. Where would you go?

A. We would go to his house, or we would come to mine.

Q. All right.

And you would sit and have your chats?

A. Whatever.

Q. Would other people be there?

A. No.

Q. All right.

Just the two of you?

A. Sometimes there might be a third person there.

Q. What was his girlfriend's name, the black girl?

A. I can't remember.

Q. You don't recall.

Well, he had that girlfriend before or after you met Beverly?

A. Before.

Q. Now, so he had a black girlfriend for a year or so before your arrest, two years, maybe?

A. I don't know.

[1630] Q. And he would go out – would you ever go with him when he went out to a public place with the black girlfriend?

A. No, never.

Q. How about Beverly, did you ever take her to a public place?

A. Yes.

Q. And that's when she would buy you dinner?

A. Or I would buy her one.

Q. Now, you began in 1981 – or after you got the guns, you went to Cleveland State and you would carry the weapon with you?

A. Sure.

Q. Now, you were mugged, I believe you told Alice Davis, three times by blacks and then chased when you were walking toward your home, or in your neighborhood, something like that?

A. Something like that.

Q. All right. And that somebody – did they take shots at you, or anything?

A. Yes, they did.

Q. And that upset you, certainly?

A. Wouldn't it upset you?

Q. I said it upset you, didn't it?

A. Of course. It would upset anybody.

[1631] Q. And because of the street attacks, or street crime, you made the decision, and the burglaries at your house, you should arm yourself, not only when you went to your house, but, and for war, or to and from wherever you were going?

A. I think a lot of people are doing that now.

Q. You made a decision to violate the law and carry a concealed weapon because you felt it was in your best interest to do?

MR. SHAUGHNESSY: Objection as to the violation of the law.

THE COURT: Objection sustained.

You are to disregard that.

Q. You decided to carry a concealed loaded weapon that you knew worked because you felt that's what you wanted to do?

Do you understand the question?

A. It was not a question, it was a statement.

Q. You made the decision to carry a loaded gun that you knew operated, concealed on your person, didn't you?

A. I made a decision to carry the gun, absolutely.

Q. And it was loaded?

A. Of course.

Q. And it was operable?

[1632] A. It wouldn't make any sense if it wasn't loaded and wasn't operable.

Q. And you knew that?

A. You may as well carry a water pistol.

Q. And you knew that, didn't you?

A. Sure.

Q. And that you knew that if you decided to use it, you would?

A. Absolutely.

Q. And the situation would be as you saw it, and as you wanted it to be, that's when you would make the decision to use it, correct?

A. The situation would arise whenever it would arise.

Q. That you felt you were in danger, correct, that

you would use the weapon?

A. Whatever.

Q. Whatever.

You said that you got the guns for your protection and you carried it for your protection to and from the school, the university, the work, or wherever you went, correct?

A. Indeed.

Q. So you made a decision that if someone would attack you, rob you, mug you, or do something to you, [1633] you would react with the gun, if you felt it was necessary?

A. Well, I certainly wasn't going to stand there and let them kill me.

Q. So the answer is yes?

A. Absolutely.

Q. And you did this, I would imagine, all during 1980?

A. Sure.

Q. When you had your five shot revolver?

You did it all through 1981, every day, according to you, it's like putting on your shoes and socks?

A. Right.

Q. And all through 1980 you didn't shoot anybody?

A. Didn't have to.

Q. You didn't take your gun out and threaten anybody?

A. Didn't have to.

Q. And in 1981, it was the same thing, right?

A. Absolutely. It was almost like when you have that gun on you, people somehow know to stay away from you and they don't approach you; but there was one day I left the gun at home and I went downtown and I was attacked by a black man with a brown – a [1634] brown paper bag, he busted it over my head and tried to get my pay check.

Q. What did you do then?

A. I started carrying the gun after that.

[1635] Q. No. No.

When he approached you, did you stand and fight?

A. Sure.

Q. And did you beat him up?

A. I didn't beat him up.

Q. Did he beat you up?

A. No, he didn't. He didn't get my paycheck either.

Q. You ran away then?

A. Ran to the place to cash my check, I only had about five minutes to get there before it closed.

Q. I said you ran away when he came to beat you up, take your paycheck, you scanted away and protected yourself?

A. I certainly didn't stand there and attempt to fight any longer than necessary.

Q. You struggled enough to get away; is that a fair statement?

A. I supposed that is a fair statement.

Q. And then you ran away from him?

A. No, I didn't run.

Q. A fast walk then?

A. I went to the place I had to go because I only had about five minutes to get there.

Q. So that convinced you again, you said, look, the one day I forgot to carry the gun, I have been carrying for two years, I never will forget to carry it again, because I can [1636] be attacked, assaulted?

A. Just like the white girls, sir.

Q. The white girls were at a lesbian bar?

A. I don't know.

Q. You conveniently forgot?

A. What was the guy doing there, was he a lesbian too?

Q. I thought you said he grabbed them out of a parking lot?

THE COURT: Just answer the question. Put another question.

Q. I thought you said he grabbed them out of a parking lot?

A. That's what the newspaper said.

Q. That's what you said.

A. That's what the Plain Dealer said.

Q. And you knew it was a lesbian bar because it is one of your kind, homosexuals?

MR. SHAUGHNESSY: Objection to the lesbian, whatever that is.

THE COURT: Overruled.

Q. You know that, don't you?

A. No, I don't know that. I didn't know the name of the bar.

Q. Well, so you are carrying your gun as a regular course of business, like putting on your shoes and socks on, [1637] because you don't want anybody to assault and take advantage of you, you go on to Cleveland State on February 1, 1982, correct?

A. Correct.

Q. And because you felt that you had a hangover, you felt that you didn't want to go to work on that day, you called and got a free day, so to speak, you got paid and you took a day off?

A. That's one of the privileges of having that job.

Q. And you called in sick when you actually weren't sick?

A. You have to use your sick days anyway. If you don't use the days, they pay you for them anyway, whether you use them or not.

Q. So you wanted to get a benefit and you got them?

A. I guess, there's nothing wrong with that.

Q. I didn't say there was anything wrong with it. There was a benefit, I said there was a benefit and you wanted it and you took it?

A. I say it's the privilege of working at that kind of a job.

Q. You also told us on direct examination not only did you have a hangover, but you had domestic problems that day?

A. That's right.

Q. And domestic problems must have been with Laverne [1638] then?

A. No.

Q. You had domestic problems with Alice?

A. Right.

Q. And you and Alice weren't getting along that day; is that a fair statement?

A. Well, I don't know.

Q. It kind of goes along with your background, didn't it, that if you are with a woman, you can't get along with her?

A. That's not true.

Q. You couldn't get along with Laverne?

A. That's not true. We had times that were good, fabulous.

Q. There were times at least two times you were divorced from her?

A. Indeed.

Q. You can say due to the fact you were divorced twice, there were times when you didn't get along, significant differences?

A. There were times in every marriage, times you get along good and times when you don't.

Q. You don't think every marriage has the husband who is a homosexual?

A. Not all of them.

[1639] Q. Yours is a little bit different, we would agree with that, there are differences?

A. What about them?

Q. And you had a problem with Alice Davis, was it the same problem you had with Laverne, because of your homosexuality?

A. Not the problems with her. She drank too much.

Q. Her fault again, something she did, right, she did something wrong, not you?

A. I didn't do anything wrong.

Q. All right. I understand.

She drank too much, you were angry with her, upset, whatever the word you want to use, and you had a hangover, and if you have a hangover, it must had been that you drank too much the night before?

A. Because I was drinking with her.

Q. So you drank too much, it was her fault, you drank too much, you had a hangover, you were mad at her?

A. Every time she was there, she was drinking. I couldn't go to work in the morning and when she wouldn't be there, I went to work.

[1640] Q. So she caused you to miss work, she caused you to drink, and you were upset about that?

A. Well, I wasn't upset about it.

Q. You didn't go to work that day?

A. No.

Q. And you remember being arrested September 4th, the police came and got you an Ron Reddish bailed you out that Sunday night and he had his girlfriend and Beverly was over your house, or was it Saturday night?

A. Saturday night.

Q. And you were drinking wine and smoking reefers?

A. I don't remember.

Q. Well, if you recall Beverly being there, do you recall Beverly being there?

A. I believe so.

Q. Do you recall Ron being there?

A. Sure.

Q. You recall Ron's girlfriend being there?

A. Yep.

Q. You recall talking about the fact that police had your guns?

A. I suppose the subject came up.

Q. You suppose it came up?

A. Yes.

[1641] Q. And the fact that Beverly was called by Detective Oliver and Beverly was going downtown to see Detective Oliver and you dissuaded her from doing that?

A. Well, I didn't dissuade her from doing that. She wasn't going to do it on her own.

Q. You were smoking some reefer?

A. I don't know.

Q. It is possible you could have been smoking reefer, but you don't choose to remember that?

A. I can't remember if I did or not.

Q. You were drinking?

A. It's possible.

Q. Didn't you say just a second ago you were drinking that night?

A. I don't know. I don't remember that.

I got other problems.

Q. You had problems, there's a distinct possibility you were drinking and certainly Alice Davis wasn't with you that night so you couldn't blame her for what you did on September 4th?

A. I'm not blaming her. There's no reason to blame her.

Q. Well, you told us a little while ago that every time you were with Alice Davis she caused you to drink. [1642] you would have a hangover and you would miss work?

A. Yes, sure. She likes to drink a lot and when I was with her, I would drink more than I normally would and I would have a hangover.

Q. So you went to Cleveland State, you went to the library, what floor of Rhodes Tower did you go to?

A. The first floor.

Q. You walked in there and there's a little metal detector there so you can't steal books, is that right?

A. Sure.

Q. Did you have identification for Cleveland State?

A. Sure.

Q. You weren't a student so that identification was false, correct?

A. It wasn't false.

Q. You should not have been in there because you were not a student?

A. Well, anyone can go in there. You can go in there.

Q. And that kind of angered you, the security was laxed, and that kind of got to you, anyone could go in the different areas of Cleveland State?

A. No, that's public property and anybody should be permitted to go in there.

[1943] Q. You testified you had been to Cleveland State and you had been in a particular rest room a number of times, quite a few of the rest rooms and you were aware of the different activities that went on?

A. Sure. Who wouldn't be?

Q. And this was a winter day and you go to this particular rest room –

A. Incidentally, that wasn't the only john in the university like that, there were others.

Q. Well, you probably prowled around the bathrooms looking for them, didn't you?

A. No, sir.

Q. You didn't do that?

A. No.

Q. Well, that's why you know where all the homosexual bathrooms are?

A. Well, everybody who goes there knows.

There's johns all over there and there was a lot of telephone calls about it, complaining about the

THE COURT: Wait a minute. Wait a minute. Put another question to the witness.

Q. So you went into the library which is the Rhodes Tower, according to you, and you read a book [1644] called what?

A. Germany Today.

Q. And there was no question in your mind it was in that library?

A. It was in that library.

Q. And you're just as accurate about that as your testimony about the two girls and John Hardaway?

A. Indeed it is.

Q. Tell us what the book is about.

A. Well, there are many different articles in the book in Germany Today.

There's articles on the different problems like the population and things like that.

Q. You told us it was Germany Today, 1963, didn't you?

A. I believe it was 1963. I believe that was the date inside the book. It was a reprint, not the original copy.

Q. I'm sorry. I thought you said on your direct examination this was a book written in 1963 about how Germany was in 1963.

A. That's what it was.

Q. Well, you're mistaken again about that and it would be the same thing that you were mistaken about John Hardaway when you testified about John

[1645] Hardaway?

A. I'm not mistaken about that.

Q. Your testimony is there was a book in that library and you read that book and the book was Germany Today and that concerned how Germany was in '63?

A. Absolutely.

Q. You stand by that like you stand by your other testimony?

A. Sure.

Q. So you were there, you were in there and you got there about 9:30 or so. You were there for an hour or two hours reading this book according to you and somehow you decided to leave that library?

A. Sure.

Q. Then you decided to leave. When you decided to leave, you said you had to go to the rest room?

A. Yes.

Q. So you didn't go to the rest room on the first floor there, did you?

A. No.

[1646] Q. When you got out of the library, you walked over to the restroom, you walked outside on a cold day, you walked outside to that restroom where you knew homosexual activity goes on.

A. Sure.

Q. And you went there because that's exactly where you wanted to go, you wanted to engage in homosexual activity that day.

A. That's not true.

Q. But that's exactly what you went there for, you went there because you were rebuffed by Alice Davis, she knew you were a homosexual, and she couldn't get it on with you or you couldn't get it together and you were upset, you were upset, so you left out that morning.

A. No, that's not true.

Q. That's not true?

A. No. As a matter of fact, we heard testimony in here that Reverend Rickerson was in the library that day reading and if you want to say that's true, he also left the library and he walked out to the same restroom where I was. When you say I went to the restroom where the homosexuals hang out, obviously maybe he went there for the same reason, too, didn't he?

Q. Well, I thought you said homosexuals hang out there.

A. I didn't say that; you said it.

[1647] Q. Oh, it was me.

A. Well, you're saying it, too.

Q. You went there where the homosexuals hang out because you were having a problem with your girlfriend, and you were a little hung over and now you wanted to see what you could see and what you could get in.

A. I was disturbed about the problem that was over there.

Q. Now, you thought about this since you have been in jail for nine months and you had a chance to think about what you were going to tell us.

A. I thought abut that a long time ago.

Q. You told the police you shot him because he was a queer, and now you have changed it a little.

A. Now, I haven't changed it. I told the jury he was in there exposing himself and making lewd and obscene gestures and he was trying to get me to participate in something and that is why I took the gun out and shot him.

Q. It had nothing to do with the fact he was a black man.

A. That was a secondary motive.

Q. But you thought about it after you did it to try to excuse your conduct?

A. There's nothing wrong with my conduct.

[1648] Q. We'll see about that in a few days, won't we.

A. My conduct was in perfect accordance with the tings that are written in this Bible.

Q. You always have to blame somebody else or you use somebody else, and now you're saying, you're blaming the Bible, you are trying to blame the Bible for what you did.

You went to the bathroom and you knew homosexuals were there and you were upset.

You knew you were probably going to see homosexuals in that bathroom, isn't that a fair statement?

A. Well, there was a probability that some of them might be there.

Q. And when you went and you saw Tim Sheehan and Tim Sheehan was a white man and you saw him and you felt he was probably a homosexual in that bathroom.

A. No, I didn't. I don't know if I saw Tim in there or not.

Q. Well, you asked him if he wanted to –

A. Wait a minute. Wait a minute.

We have not established whether I saw Tim Sheehan in there in the first place.

Q. Well, you told the police you saw him there. You told Detective Ferriss, the gentleman seated in the back there, his partner Detective Patton, you told Detective Beavers and his partner Detective Taliaferro, you told [1649] them orally that you saw Tim Sheehan in the bathroom before Rickerson came in there; you don't remember that?

A. No. Tim Sheehan I did not see him there.

Q. But you saw Tim Sheehan, and when you approached him you asked him for homosexual encounter of some kind and he rebuffed you because the man was a gentleman and he wasn't a homosexual and he wasn't going to participate in anything like that, he wasn't engaging in any homosexual activity.

A. Well, let's get something straight.

If Tim Sheehan was there that day, I would have known it because I would have seen him. I would know if I had seen him or not. You just say –

Q. You don't think --

MR. SHAUGHNESSY: Objection. May he finish the question, your Honor?

MR. NUGENT: I didn't ask him the question.

THE COURT: Put a question.

Q. Don't you think the sooner you were arrested and you talked to the police right away, the things that were freshest in your mind, that would be the most accurate, wouldn't you agree with that rather than sit around for nine months thinking about and listening to all of this testimony and then deciding what you want to say?

[1650] A. Well, I was there; you weren't there.

Q. When the police asked Tim Sheehan as soon as they asked him did he see anything going on that day, and he said he didn't see anybody there.

A. Well, I didn't remember. Tim Sheehan didn't tell the police he saw anybody.

Q. I think my question was, wouldn't you agree when you were asked on September 6th when you talked to Detective Beavers and his partner, Detective Taliaferro, you talked to Detective Ferris and his partner, wouldn't the events be more fresh in your mind that they are now?

A. They're still fresh in my mind.

Q. Well, it was closer to the events so they would be fresher in your mind, would you agree with that?

A. I won't agree, of course not.

Q. You won't agree because they have said something different than you are saying.

A. Well, they said a lot of things different.

Q. Of course they did.

A. Of course they did.

Q. You had a chance to listen to all of the testimony and now you are trying to change the testimony as to what fit you best. Now you're trying to change your testimony, you're trying to change

your testimony to tell these people just what you want them to hear.

[1651] A. I think the greater weight can be put upon my testimony because I was there that day and those detectives weren't and nobody else in this courtroom was there that day either.

Q. Well, you were given an opportunity, weren't you, to make a statement, a complete statement in telling everything you knew, everything about these cases, write down whatever you wanted to say, weren't you?

Didn't these officers, these fine officers give you that opportunity?

A. Sure.

Q. And then you decided, no, I'm not going to put everything down because then I'm stuck with that story, but what I'll do is I'll say yes, I told you everything.

A. I wasn't prepared to tell my statement until I get into court. I told the detectives that. I said that I will tell everything that I have to tell when I get into a court of law and not sooner.

Q. I'm sure it doesn't say that in your statement, does it?

I believe it stated in your statement that you will leave it up to the police to prove or disprove –

MR. SHAUGHNESSY: Excuse me, your Honor, I can't hear.

THE WITNESS: That's right.

THE COURT Mr. Nugent, they [1652] can't hear. Keep your voice up.

MR. NUGENT: I'm sorry.

THE WITNESS: I mean, this is kind of rediculous, like being on a merry-go-round, going round and round and round on things like this.

Q. What's happening is the people here are beginning to understand that you went into that bathroom looking for homosexual experiences and Timothy Sheehan rebuffed you and that made you angry.

A. That doesn't even enter into it.

The only guy that was there that day was the black man.

Q. Then you went into the bathroom, the men's stall, you went into this stall (indicating)?

A. That's where I was.

Q. And you didn't go in the men's stall to go to the bathroom.

A. Yes, I did.

Q. You weren't using the bathroom when Reverend Rickerson came in.

A. He was already in there before I got in.

Q. Well, you knew he was in there.

A. I knew he was in there once I got in there and I saw him sitting there.

Q. When you walked in, you could see his feet up under [1653] the door, you could see through the big hole.

A. Sure.

Q. You didn't use the first one, you didn't use the first stall, you didn't use the one you call a glory hole.

A. I don't know what they call it.

Q. Well, what do you call it?

A. Hole.

Q. The first one didn't have a hole?

A. Sure.

Q. You knew that?

A. Yes. Even that diagram shows where the hole was.

Q. Did you understand my question?

I said the first one didn't have a hole, and you knew it.

A. Sure.

Q. So when you saw Revered Rickerson enter into this one (indicating), is that right?

A. Yes, sure.

Q. Because the hole was there, correct?

A. Because it was empty, too.

Q. The first one was empty, too, but you made sure of that, you went into this one (indicating), you knew Reverend Rickerson was there, he had all of his clothes hung on the side and he used the facilities, he was using the toilet, wasn't he?

[1654] A. I wouldn't see his clothes that he hung up on the side, all I could see was him sitting there.

Q. Well, maybe I can refresh your memory.

State's Exhibit 9, the poor man was sitting there using the toilet, is that right?

A. Certainly.

Q. And you could see that?

A. Yes.

Q. You looked through the hole at him, didn't you, Frankie?

A. All I saw was him sitting on the commode.

Q. I didn't ask you that.

A. No, you didn't.

Q. You knew Revered Rickerson was in there and you wanted to have a little homosexual activity with him so then you –

A. I didn't ask him anything.

Q. And the man rebuffed you after you said whatever you talked about and –

A. Nope.

Q. – and that was the second rebuff you had; not only Alice Davis rebuffed you but –

A. What an imagination you got.

Q. – but you were also rebuffed again by Reverend Rickerson and you took your gun out and you started shooting [1655] him then because you made a decision you didn't want to be rebuffed again that day.

A. It had absolutely nothing to do with it.

Q. So you drew your gun out, you drew your gun out your coat pocket, your pants pocket or your hip pocket, or wherever you kept it, correct?

A. Correct.

Q. You took it out and you started shooting through the hole at the reverend as the reverend was sitting on the commode, and there's no doubt he was sitting on the commode with his pants down.

A. Sure, sure.

Q. And he was looking straight forward like this (indicating)?

A. I don't know which way he was looking.

Q. So you looked at him as you just told us –

A. I did not see his face.

Q. Well, he was sitting there with his legs going straight forward –

A. Whatever.

Q. And his hands were down at his side.

A. I don't know where his hands were.

Q. Well, I thought you had a conversation with him.

I thought he asked you to do something.

A. I did not have a conversation.

[1656] Q. I thought he asked you something.

A. The only thing I sit on the commode and he got up off his commode and then he started exposing himself through that hole at me.

Q. Oh, he wasn't sitting on the commode, he got up and he took his pants down and started exposing himself as you were sitting on the commode?

A. That's right.

Q. So he was standing there exposing himself through the hole?

A. Yes.

Q. And you were on the commode and you were upset because you didn't expect something like that, is that right?

A. Whatever.

Q. And what did you do?

So then you said I have to do something, so you said you got up – what did you do? Did you pull your pants up?

A Absolutely.

Q. Absolutely.

So you got up, you pulled your pants up and did whatever you did and then you said, I'm going to kill him, you took your gun out and the reverend was still standing there exposed, according to you, and you started to shoot?

[1657] A. That's right.

Q. Is that right?

A. Right.

Q. Is that what you're telling us?

A. Revered Rickerson exposed himself, he got up and then he sat back down on the commode and that's when I shot him.

Q. So he sat back down now on the commode?

You didn't get up and pull your pants back up, buckle your pants belt, take your gun out and start shooting?

A. Well, whatever.

Q. Well, it's not whatever, you were there.

A. Sure.

Q. So he turned around and then sat down again.

A. That's right.

Q. And he still sat down and as he was sitting, as you know he was sitting in the most defenseless

position on the commode with his pants down and the poor man was only trying to go to the bathroom and you didn't like him because he rebuffed you and —

A. Well, that rebuffed stuff is all bullcrap.

Q. Is bullcrap, is that in the Bible you carry with you now?

A. I don't know. I will have to look and see.

[1658] Q. So you made a decision in advance to pull the trigger, didn't you?

A. I don't know.

Q. Because that's what you're charged with and you don't want to answer that question, do you?

A. I'm not sure how to answer that.

Q. Well, you made a decision to shoot and kill him before you took the gun out.

A. All I know is what I did.

Q. And you knew you had a gun and that was the design, that was the type of instrument you wanted to use to cause his death, the gun.

A. Well, it makes sense.

Q. The poor man is sitting there defenseless, you got him while he was sitting on the commode so he couldn't retaliate or fight back trying to defend himself and you made sure of that, didn't you?

A. So what.

Q. You sat there and you began to shoot and according to your testimony on direct all you did was shoot in there and then you ran out, that's what you said, isn't it?

A. Well, I left. There was no reason for me to remain. The job was done.

Q. That's not what happened, is it, Frank?

A. That's exactly what happened.

[1659] Q. Because as the man tried to defend himself, the man got up, didn't he?

A. Well, I wasn't there.

Q. He tried to struggle out and you kept shooting and the man fell through the door, you know he fell through the door because that's where we found him.

A. You found him there, but he wasn't there when I was there.

Q. And as the man laid on the ground and unable to defend himself, you shot him in the arms three times, shot in the side three times, and you had your last seventh bullet and you wanted to make sure this man would never make a homosexual rebuff at you again, so you walked up to him and you put the last bullet into his chest; now, that's exactly what happened, isn't it?

A. No.

Q. Well, you don't want to tell us these things because it makes you sound like the coward you are.

A. That is not what happened.

Q. Now, the police found a pellet right by Reverend Rickerson's head outside, didn't they?

A. Well, I don't know if they found the pellet out there or not.

Q. So if they found the pellet outside lying there by his head –

[1660] A. Well, it could have ricocheted off the

wall.

Q. I'm sorry, or the casing. It didn't bounce off the wall if you're standing inside your stall with the door closed, it didn't bounce off any wall if the gun was through the hole and you followed him outside and the man fell down and the bullet passed through the hole, hit the wall, and it had nowhere to go?

And isn't it something, you have three on the left side of the stomach, the abdomen, and the last one, just where Sharon Rosenburg said the nitrite 18 inches or so from his sweater right under his right nipple, right under his chest, and that fit perfectly because again like we agreed, photographs don't lie; so it isn't like you told us, is it?

A. It happened like I told you, but actually the whole thing is irrelevant.

Q. But if it happened the way it shows it happened the way the evidence shows it happened, it shows you are a coward –

THE COURT: The objection is sustained. Put a question.

Q. After you shot Revered Rickerson, you left and you ran away.

A. Well, I went to get a cup of coffee.

Q. Did you think about what you had done, you though you [1661] were going to get caught, too, didn't you?

A. Not necessarily.

Q. You told us on direct you watched television and you were shocked, you were surprised that no one heard the shot or heard you. No one heard the shots?

A. That is astonishing, isn't it?

Q. So you thought that you were going to get away?

As a matter of fact, you told Alice Davis about it. You said, to paraphrase your language, you just shot a nigger.

A. Sure.

Q. And Alice Davis never went to the police about that, did she?

A. No, she didn't.

I wonder why she didn't say anything. I wonder about that.

Q. Maybe she was afraid of you?

Maybe because you told her if she told the police, you would do something to her.

A. Well, I don't think so.

Q. You didn't even think about that?

A. No.

Q. You know she talked to the police after you were arrested, don't you?

A. She may have.

[1662] You didn't call her as a witness either.

Q. And Cathy Student, you told her afterwards that you committed the perfect murder because you didn't get caught.

A. It was pretty nice. You got to admit it was pretty nice. You got to admit it was pretty slick.

Q. Well, it's not too slick, look where you're sitting.

A. What of it?

Q. So it wasn't the perfect murder, but you thought it was then because you thought you got away with it and you told both Cathy and you told Alice and you told Janet, Janet Shields you did it because the man was queer.

A. Because he was black had a lot to do with it, too.

Q. But you told them you killed him because he was a queer.

A. There was no doubt about it.

Q. You told them the reason you killed him because he was queer.

A. Absolutely. The guy approached me.

Q. You told us you carried a gun in 1980, 1981, 1982 for your protection, so if someone assaulted you or offended you, you were gong to use it, didn't you say that?

A. Sure.

Q. And that's exactly what happened in this restroom, you were rebuffed and you used it.

[1663] A. No.

A. After that you laid low for a while. You read the papers. You showed Cathy the paper. You showed Alice the newspapers. Then you said, yeah, I did it. This is me. They don't have any suspects. Then you listened to the radio?

A. Sure.

Q. You listened to the radio to find out if there were any suspects and what was happening.

Then you went back to the campus to see if

anyone could identify you, see what the security was there?

A. Sure.

Q. Because you were afraid of being caught, is that a fair statement?

A. That's a fair statement I listened to the radio and went back to the campus, but that's all.

Q. Did you tell Ron Reddish about it?

Did you tell Ron Reddish that it happened to be a black man and I got away with it and this happens to fit in with the Naziism mumbo-jumbo, the white supremacy, and Reddish talked about it with you, you told him the guy was a queer, didn't you tell him about that?

A. Yes, I told him that.

Q. And Reddish decided at some point in time, [1664] at some point in June, you decided to go around trying to find a black man to shoot, correct, because once you did it, you have overcome that hurdle of killing someone?

A. Sure. Once you picked up the cross, you got to go all the way to the bitter end.

Q. Well, it's no cross, once you pull the trigger you have crossed the hurdle.

A. Well, what's the difference, one, ten, a hundred, a thousand, a million, six million, what's the difference?

Q. Then you went to 117th Street, I think you said, and you started at eight o'clock or nine o'clock that night and you were armed?

A. Sure.

Q. Your buddy Ron was armed and you were driving around trying to find a black man to kill or to shoot, is that correct?

A. I don't' know if that was our desire and intent, but we were riding around.

Q. What was the reason for you to arm yourselves, you decided to ride around the City of Cleveland, you were armed, Ron Reddish was armed and –

A. I don't know if Ron was armed or not. I was riding around in Ron's car.

[1665] Q. Well, I thought your equipment was in the glove compartment.

A. No.

Q. Well, what about Ron's weapon?

A. Well, I don't know if he had one or not.

Q. There are a couple things that are clear about what you were doing, you and Ron. You and Ron are pals and you are riding around talking about killing a black man because he was a queer, and you have the same philosophies about black people, but you don't know whether he was armed when you were out there hunting party, is that what you want this jury to believe?

A. Well, Ron only had one pistol.

Q. That's not my question.

A. Well, he only had one and he could have bought it in July or August.

On that day he might not have even had his pistol.

The only thing that's relevant, the only

important thing is I had my pistol, my pistol was on me and I was riding around in Reddish's car.

MR. SHAUGHNESSY: Objection, your Honor.

THE COURT: Overruled.

[1666] Q. You say in your statement that you were ready to accept the burden of these acts and in so doing I admit I acted alone, is that true?

A. Yes, it is.

Q. And Ron Reddish is without fault?

A. I was only riding around in Ron Reddish's car.

Q. Now, what about John Hardaway?

A. Well, there was only one person that approached John Hardaway, only one person pulled that trigger, and I was the one that did that.

Q. Ron Reddish drove to the RTA station and that was his car, is that not true?

A. Yes, it was his car.

He never did go into that bar.

Q. Well, what about John Hardaway?

A. Well, thereis only one person that approached John Hardaway, only one person pulled that trigger and I was the one that did that.

Q. Ron Reddish drove to the RTA station and that was his car, is that not true?

A. Yes, it was his car.

He never did go into that bar.

Q. Well, Ron Reddish went into the Black Horse, after he had driven to that RTA station and after

[1667] Hardaway leaves the station, Reddish runs out of the bar and --

A. He did never go in that bar.

Q. Ron Reddish knew that, he knew when he walked into the Black Horse Bar, when he saw Hardaway walk out of the Black Horse, he saw him and he followed him and he knew what you were going to do, didn't he?

A. Did he?

Q. I'm asking you.

A. I don't know what he knew.

Q. After you shot Hardaway you came running back to the car like you normally do, running back to get away, and you jumped in and you got the smoking pistol in your hand and he knew what you did there, too, didn't he?

A. I don't know if he knew or not because that was inside the station. I don't think he could hear any shots.

Q. Didn't you tell him what you did?

A. Yes, I told him afterward.

Q. And then you drove off in his car to have pizza and a cup of coffee or pizza and beer or whatever?

A. Sure.

Q. So you knew beforehand – he knew beforehand [1668] what you were going to do and –

A. Well, you're mistaken. He was never in that bar. He stayed in the car the whole time. When I left the car, I went into the Rapid and he was still in the car when I came out. When I came out the bar, he was still in the car and Hardaway came out the

bar and went in the Rapid and that's when I followed him back in there and I plugged him.

Q. Just like the cowardless way or the lack of courage, you wanted to take John Hardaway in a position where he wouldn't – where he couldn't defend himself, too, didn't you?

A. The wisest attack is always to attack at the point of the least resistance when the enemy's guard is down, then you sneak up, you sneak up on him and you attack.

That's always the best way to attack. When you're fighting the guerillas in the guerilla warfare, you have to use the guerilla tactics. They did it in Vietnam, they did it in Russia, they did it in France and everywhere else.

[1669] Q. So in order to explain your cowardice you have thought over the last nine months what to tell these people, to explain then, it certainly is not in your statement?

A. It is good military strategy. When we were going to invade Europe over there, we didn't attack where Hitler's troops were the strongest, we attacked at Normandy where there were very few. We knew when we landed in Calais, we knew we would get our asses kicked, so we landed in Normandy where there were very few troops.

THE COURT: Put another question.

Q. When John Hardaway walked by you, and you knew you wanted to shoot him, --

A. It was a deadly eye.

Q. I'm talking about when you walked by him, you chose to shoot him, you said you watched him walk to the parking lot and walked by?

A. Walked right past the car.

Q. Were you in the car with Ron then?

A. I was standing outside the car.

Q. He walked right by you?

A. That's right.

Q. And you chose not to shoot him then, right?

[1670] A. He was out in the open. It would be better to go inside and get him.

Q. My question to you was, you chose not to shoot him at that time?

A. Whatever.

Q. And you didn't.

As he walked by, what kind of motion did you make to Reddish? That you were going to follow Hardaway in?

A. After he went in, I just said to him, wait a minute, I'll be right back in a minute.

Q. And then you went in and Hardaway had his back to you, that poor guy was waiting, watching the Rapid?

A. As I came up the stairs, he turned to face me.

Q. He turned and he turned back, didn't he?

A. No, I think he looked at me the whole time.

Q. Did you have your glasses on that night?

A. Yes.

Q. And so he saw your eyeballs magnified through your glasses?

A. Right.

Q. And you have got both hands on the gun like that (indicating)?

[1671] A. I don't think I had both hands. I think if I had both hands on it, my aim would have been a little more accurate, and all seven shots would have hit rather than five.

Q. Like you were accurate with Warford?

A. Very accurate.

Q. I think one out of seven shots?

A. I used two hands that time.

Q. You only hit him once?

A. I didn't let him get away, did I, Hardaway?

Q. Do you understand what I said? You only hit him once?

A. Did I? It was only once? It was a good shot though.

Q. This is God's will. You remember talking about God's will, you were relying that?

A. Sure.

Q. It was God's will John Hardaway survived?

A. It must have been.

Q. It must have been God's will John Hardaway had the strength and fortitude and intelligence to go to the doorway and lay on the Rapid platform?

A. I had no control over that.

Q. I say it must have been God's will that it happened?

[1672] A. Sure.

Q. It must have been God's will that the last

Rapid car just happened to come by at that time?

A. Sure.

Q. Because the man stopped, Mr. Mason stopped, because he saw John laying there?

A. I think John is a fortunate guy to be around.

Q. That's God's will, John Mason stopped and saw John Hardaway? That's God's will?

A. No question.

Q. No question God's will that there was a medical student on the car and he gave First Aid?

A. Yes.

Q. No question God's will EMS got there in a minute or so and did the life saving techniques to keep him alive?

A. No question.

Q. No question God's will the expert surgeon was at St. John's and did indeed help him?

A. Yes.

Q. All of those were God's will?

A. Had to be.

Q. No question?

A. None whatsoever.

[1673] Q. After Hardaway was shot, you made – or before Hardaway was shot you made a decision in advance of shooting him that you wanted to cause his death, didn't you, that that was your desire?

A. Sure, it had to be done.

Q. And that you made a decision in advance of that that you were going to use a gun?

A. Well, I wasn't going to use a spear or a bow and arrow.

Q. So you made the decision to use the gun and you did?

A. Sure.

Q. And you also began to think that, well, I got away with the Rickerson thing, I want to get away from Cleveland State because I don't when them to link the Rickerson killing to me, so you went there on a Rapid platform where you didn't think the police would link the two together?

A. And they didn't.

Q. That was your thought process, that you didn't want the police to link the two shootings together, and link it to you?

A. They didn't link them together.

Q. Do you understand my question?

You thought about that before you shot Hardaway, [1674] that you were going to go on the west side, 117th Street, or in that area, find a black man so they wouldn't link the killings to the queer, as you call him?

A. I don't think it came up until we saw the guy, you know, walking down the street, then the thought popped into my mind then.

Q. Well, that they would link the two?

A. No, the thought about shooting him popped into my mind when I saw him walking down the street.

Q. You had seen other black people that night, hadn't you?

A. No, sir, the first one.

Q. And this is the night you said you were going out on a hunting party I thought?

A. I don't think we were hunting that night. It turned out pretty good.

Q. Now, you felt that you were going to get away with this because you didn't think the police could link the casings to you, did you?

A. They didn't link them up. We heard the testimony from that.

Q. They didn't link the pellets because you destroyed your barrel to your gun?

A. No, I destroyed the gun because Hardaway lived, [1675] I thought the gun was no good anymore.

Q. Oh, yes.

Well, you shot Timothy Sheehan with the gun and you shot Brian Warford with the gun?

A. Different gun.

Q. That's not what the testimony was, is it? Same exact slide for –

A. Slide, but the rest of the gun was different.

Q. You destroyed the barrel because you thought the only way the police could get to you was because the pellet and the lands and grooves inside the barrel of the gun, because that's the only part the police didn't find; isn't that a fair statement?

A. No. They found casings there, too.

Q. Well, you rubbed out the serial number and the make of the gun and you did that on the grinder to make sure, you thought you rubbed it out enough so the police couldn't identify that enough, too,

correct?

A. It had nothing to do with that.

Q. And you intentionally rubbed out the Erma Excam, Hialeah, Florida, and the serial number? There is no question that you intentionally did that?

A. Well, I cut it up pretty good, didn't I?

Q. I said there is no question you intentionally [1676] rubbed out the writing on the gun out?

A. Whatever.

Q. And you did it in the hopes that the police couldn't trace that weapon to you?

A. And where did they find it?

Q. You want to answer my question?

[1677] A. Where did they find the rim to the gun?

THE COURT: Just a second, Mr. Spisak.

THE WITNESS: He said they couldn't trace it to me and found the house, that's the stupidest thing I ever heard of in my life.

Q. You tell us the reason that you scraped off the Erma Excam Hialeah, Florida 33013?

Why did you scrape that off if you didn't want to keep the police from finding it? And the serial number, you scraped that off, too, didn't you?

A. They found it in my house, didn't they?

Q. You don't want to answer my question, do you?

Now, you lost your job, not only do you have a problem with being a homosexual, now you lost your job in August, and you are looking for somebody else to blame, or somebody else to call, or blame for your troubles, whatever you want to do, and you go to

Cleveland State and you are armed with your derringer.

Now, again, you carried your .22, your derringer?

A. Let's go back a minute to the part about my losing my job.

[1678] How many people lost their jobs in August of that year?

Q. Frankie, this is how it is. I ask you the questions, you give the answers, not the other way around.

Do you understand that?

A. Let's go back to the part about the job and clear that up.

THE COURT: Okay. Mr. Spisak, try just to answer the questions he asked you. Okay.

THE WITNESS: He is making statements that he has no –

THE COURT: Well, your attorney –

THE WITNESS: – basis for making them up.

THE COURT: Just listen to me, please. Your attorney will have the chance to ask you some more questions.

Go ahead.

Q. You lost your job and you needed some money, correct?

A. I had Unemployment Compensation coming in.

Q. You went to Cleveland State and you said, I

think I will hold somebody up, but you didn't want [1679] to hold up somebody that looked like me, or looked like the detectives?

A. If I was going to hold somebody up, I would go to a bank and hold up a bank. With all of the guns that are shown here, we could do a hell of a job.

Q. So you supposedly told Detective Taliaferro and Detective Beavers that you went to rob Coletta Dartt. They were mistaken about that, and when you –

A. Coletta Dartt did not testify to that on the stand that she was being robbed.

Q. Do you understand my question?

You told the four detectives –

A. You said I was trying to rob Coletta Dartt and the woman herself said she wasn't being --

THE COURT: He asked you if you told Detective Patton.

THE WITNESS: No, I didn't tell them anything like that. They are interjecting things, putting words in my mouth.

THE COURT: Okay. Put another question.

Q. So you didn't make those statements to the police?

[1680] A. Absolutely not.

Q. And certainly before you testified, before you came to court and when you were talking to the police, you had no idea what Coletta Dartt was going to say, did you?

A. Absolutely no idea what she said.

[1681] Q. Then you heard what she said and you heard she didn't say anything about a robbery – maybe I missed this part – and that you decided now even though I told the police, I didn't write it down, I went to rob her, I'll tell these folks and this jury that wasn't the reason?

A. No. No, that is what the police are thinking, but they are dealing with criminals all the time.

Q. Well, didn't Timothy Patton ask you, didn't he say it seems kind of inconsistent, why would you go and if what you are saying is you wanted to kill black people, you went and shot at Colletta Dartt and you said no, no, no, I figured she was white and that she had money?

A. That had nothing to do with it.

Q. That's why you went after her?

A. That had nothing to do with it.

Q. So Tim made all that up?

A. Absolutely.

Q. So there is no question that the testimony is that you were in the Science Building on the third floor, for whatever the police say you told them, for robbery, you stay just walking about –

A. Well, I had a right to be walking around there.

Q. And when you – Now, you hear that Coletta Dartt has a husband that worked there, you say you overheard, after hearing all this testimony –

[1682] A. No.

Q. That they were talking about –

A. Wait a minute. Wait a minute. Let's go back in the psych reports when he talked to me about that

five or six months ago I told him that I heard those voices over there, that they were talking about me. Go look it up. You have got it right there.

When I was talking to Dr. Resnick and when I was talking to –

Q. Did I ask you any of those questions?

THE COURT: Here. Just a second.

THE WITNESS: I'm telling you –

MR. SHAUGHNESSY: Objection.

THE WITNESS: I'm telling you what the strength of the testimony is to the jurors. You are trying to tell them the police said one thing –

THE COURT: Here. That's enough, Mr. Spisak.

Approach the bench.

(Thereupon a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

[1683] (Thereupon, a recess was had.)

THE COURT: Okay. You may be seated.

Mr. Nugent, you may resume your examination.

BY MR. NUGENT:

Q. Did you tell Dr. Resnick that you were going to rob Coletta Dartt?

A. No.

Q. Did you tell Dr. Resnick this, "Mr. Spisak reports that on August 4, 1982, he was laid off from work permanently. He was quite concerned about finances. He sold personal items, such as radios and

stereo equipment for money.

"He recalls that early in August, he was walking around the hallways at Cleveland State University. He states that he heard people making fun of the "White People's Party.' They were suggesting that adherents to the party were 'kooks'. He recalls feeling indignant that such nasty things were being said because they 'hit close to home.' He states that Coletta came out of the room and went down to the women's restroom. He states that he figured he would teach her a lesson. When she came out of the restroom, he stated that he planned to 'slap the shit out of her and rob her.' He states that she started to scream [1684] and kick. He pointed the gun at her, but she swung and ran down the hall, 'making me look stupid.' He stated that he fired a shot at her. He does not recall having a chance to take anything from her."

Did you tell all this to Dr. Resnick?

A. This doctor, he has mixed words. They certainly aren't mine.

Q. Did you tell Resnick that?

A. I told him I heard the voices in the hallway, that's when I went in after Coletta.

[1685] Q. You didn't tell Dr. Resnick you tried to rob Coletta Dartt?

A. No.

Q. So if he said that in his report, he is mistaken, too, just like the police?

A. Obviously.

Q. Now, Timothy Sheehan – you believe in the Fifth Commandment, don't you, Thou Shalt Not Kill?

A. Sure.

Q. Timothy Sheehan was an innocent person, according to your testimony, fine family man, Irishman.

You had nothing against the Irish, did you?

A. I had nothing personal against Timothy Sheehan whatsoever.

Q. And that you walked into the rest room and according to you that Timothy Sheehan turned and faced you.

That's what you said, wasn't it?

A. That's why.

Q. That again is not the truth either, is it?

A. Yes, it is the truth.

Q. Because Timothy Sheehan was standing at the urinal and going to the bathroom and you walked in and you made sure that no one else was in the rest room; isn't that true?

[1686] A. No.

Q. You made sure that your buddy Ron Reddish was outside to make sure nobody came in the rest room?

A. Ronald Reddish was not there.

Q. And Mr. Sheehan was standing, going to the bathroom, and you took your gun out and started to shoot at him and missed.

Sheehan was shot in the left side of his face, the left side of his jaw and behind the left side of his neck?

A. No. He was facing me and I was looking him

right dead in the eyes when I shot him.

Q. Well, again, pictures don't lie, do they?

A. Sure, they don't lie.

Where is the one that shows his whole face?

Q. And State's Exhibit 78 shows the bullet goes right in the side of his face, doesn't it?

A. Well, here in this picture we see –

Q. That's your version.

A. Right here, look at that.

Q. Listen to my questions.

You heard the coroner testify, and you heard the coroner's testimony about the path of the bullet, and they all came in from the left side. You can't change that and you can't interpret that [1687] picture the way you want to interpret it.

And how about the time you shot him in the back? Does that look like he was facing you when the bullet went in his neck and came out the back? Was that facing you?

And how about on his left side and under his arm?

Is the bullet, is that facing him here?

A. If the bullet came out the back, he had to be facing me.

Q. The bullet went in the neck and side and came out the back. You know he is not facing you. He is sideways as that bullet goes under his left arm, he is not facing you there. He is sideways, too.

A. In this picture, the entrance wound in the front and the exit –

Q. That's the exit wound, and you know it.

A. My testimony was he was facing me.

Q. Your testimony was false like the rest of your testimony. You know the man was standing there and going to the bathroom. You went in and killed him just like Beavers and Patton said, you thought he could identify you from the Rickerson killing.

A. Absolutely not.

[1688] Q. And you killed him.

And you invented then this theory about him being a Jewish professor?

A. That's what you would like to think.

Q. You invented that, and he had a pager on him, and you stole the pager. So you are a thief?

A. The pager was laying on the floor.

Q. And you knew it was laying there, you stole it?

A. I took it.

Q. You are a thief, too?

A. I'm not denying I picked I up.

Q. You took money from him?

A. No, I didn't.

Q. You went through his pockets because you had time with the Timothy Sheehan killing?

A. I didn't take anything from him.

Q. You took the casings up –

What do you mean you didn't take anything? You took the pager?

A. All right. That pager I took.

Q. You did take something from him?

A. You said I went through his pockets.

Q. You did take something from him, Frankie?

A. No, I didn't.

[1689] Q. And you had time to pick up the casings, didn't you?

A. I picked them up.

Q. You had time because your buddy Ron Reddish was standing outside, because this time you knew who you wanted to kill?

A. Absolutely not.

[1690] Q. Because just like you told the police officers, you went on campus some other day, and you walked by him just to see if he could identify you, and you thought he gave you some idea of recognition?

A. Now, your imagination is really going to town.

Q. That's what you told the police.

You answer my question. Don't give me your speeches, because we are not here to listen to your speeches.

A. I didn't tell the police anything of the sort.

THE COURT: Just take it easy.

Q. You heard Detective Patton, that's exactly what you told him, that you went down to Cleveland State there.

A. Patton didn't say anything.

Q. And you walked by to see if there would be any recognition?

A. He didn't say anything about Reddish being there.

Q. I'm not talking about that.

A. You were just talking about it a minute ago.

THE COURT: Okay. Come on up.

(Thereupon a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

[1691] BY MR. NUGENT:

Q. You told Detective Patton, and he testified, that you went to Cleveland State to see if Tim Sheehan could recognize you, you walked by him and you thought that there was a recognition, he looked at you like he recognized you. You remember Patton testifying to that?

A. That's what Patton said.

Q. So he did testify to that and that's exactly what you told him, wasn't it?

A. No.

Q. So you had to go back to Cleveland State and you knew exactly the person you wanted to kill?

A. I didn't have to go back. I was going there for years.

Q. You went back to kill Timothy Sheehan. You had time to pick up the cases and you did it because you had one particular person in mind?

A. No.

Q. Timothy Sheehan, so you wouldn't get caught for the other murder?

A. That was a pure coincidental meeting.

Q. You left from Timothy Sheehan, you had the cases, you didn't think you could get caught with that one either, did you?

A. Absolutely not.

[1692] Q. Then you went home and you listened to the radio and you had all of that and that's part of the tapes you have too, isn't it?

A. Sure.

Q. Not just heil Hitler tapes, you had black music, Christopher Cross music, I guess you had all different types of music, didn't you?

A. Everything.

Q. And included in that you had a tape that talked about the security?

A. They talked about the security, the hall, the wall and all the homosexual conduct there, everything.

Q. And you taped that and listened?

A. Listened to it.

Q. Because you were trying to find out what the security there was and what information they had about who the killer was?

A. They had none.

Q. And you thought you got away with it because you killed the reverend, because he was a queer, and you killed the only person who you knew was a witness to that and you got away with that?

A. Timothy Sheehan couldn't' be a witness. The police asked him that day, he was the janitor, if he went around, saw anything and knew anything, and heard anything, and he [1693] didn't see anything.

Q. I didn't ask you to give me a speech, Frank.

A. I'm telling you what the facts are.

Q. And you and Reddish got together, you thought it was good, now, the witness, got Timothy –

A. Reddish had nothing to do with it.

Q. You didn't hear anything, Hardaway –

Coletta Darrt, that's kind of embarrassing thing, well, forget about that, let's go hunting, which is exactly what you and your buddy Reddish did on the 29th of August, 1982.

A. There is no question about that.

Q. And you were armed with a gun, you went there, out there with a decision to kill somebody?

A. Absolutely.

Q. And so did Ronald Reddish?

A. Absolutely.

Q. The two of you smoke reefer and drank wine too, that night?

A. Reddish does not smoke.

Q. Just you?

A. Sometimes I do.

Q. So you went and got in the car, you drove around from 8:00, you drove up and down Cedar, you drove up and down Carnegie, you drove up and down Central, you drove up [1694] Euclid, you drove up and down Chester Avenue to 105th, and around looking for the appropriate black person to kill, correct?

A. We were hunting.

Q. And you didn't' see any black people walking up and down the street, did you?

A. Here and there.

Q. But you didn't shoot at any of them because you knew if you saw one of the people you saw earlier, they could be able to defend or react to you?

A. We weren't worried about being – if he could recognize, we weren't worried if they could defend themselves, or shoot back, we had enough power to outshoot anybody, including the cops.

Q. So you were worried about being caught?

A. Absolutely. Why should we get caught? We want the war to go on and on and on and on.

Q. You resisted the feeling that you had to kill various black people until you got the appropriate circumstances that you –

A. Sure.

Q. That you saw to kill Brian?

A. Catch them at the least resistence when their guard is down.

Q. That's what you did? You drove down Euclid Avenue?

[1695] MR. SHAUGHNESSY: Objection. Can he finish the answer?

THE COURT: Just a moment.

Did he finish the answer? It's hard for the court reporters, so wait until he finishes.

Q. He drove --

THE COURT: Put another question.

Q. He drove down Euclid Avenue, you and your

buddy Ronald Reddish, you saw Brian sitting at the bus stop?

A. No, Ron was not there. He got off an hour earlier so –

Q. You were going to be cleared, you are going to put Ronald out of the picture.

A. He wasn't there. How could I put him there if he wasn't there?

Q. I think you told the police at some point, you didn't testify, you told the police that you and Ron were driving down one of the streets downtown and you were going to shoot a black man walking up the street, you seen him a couple of times, you went back to get him?

A. Sure.

Q. And you saw him, he was alone, he was defenseless, you were going to kill him and then the police car drove up and you two decided, woe, there is a policeman, we are [1696] not going to shoot at anyone?

A. It wasn't the two of us. I wanted to go out there to shoot him, but Ron stopped me because he said there was a police car over there.

Q. Because the police car was over there and because you might have been caught, you didn't shoot?

A. Because Ron was there. If Ron hadn't been there, I would have shot and got him.

Q. The police car stopped you two?

A. I didn't see it.

Q. You told the policeman that it was there.

A. It must have been there.

Q. And you told the policeman, that's why you told Detective Patton, Taliaferro and Beavers, that's why you didn't shoot that man, because the police car was there?

A. I didn't shoot the man because Reddish told me not to go out there because there was a police car there.

[1697] Q. And you know –

A. If he hadn't been there, I would have gone out there. There is no doubt in my mind. I would have gone out there.

Q. If you hadn't seen the police car, you would have gone out there and shot him?

A. No doubt about it.

Q. That's why you didn't do it, the police were there?

A. That would be kind of stupid to do with the police there.

Q. You said it.

MR. SHAUGHNESSY: Objection.

Q. Now, you said you dropped Reddish off, you see Brian sitting in the bus stop all by himself defenseless?

A. Sure.

Q. Then you parked the car, according to you, by Cleveland State University campus, and you are concerned about getting the security, because you listened to the radio, you read the newspaper, you heard the president of the University, Walter Watjen give the added security precaution?

A. Sure.

Q. He said they were going to add more foot patrol?

A. That's what he said they were going to do.

Q. They were gong to give overtime?

[1698] A. They said they were going to do that.

Q. They were going to add more police?

A. Sure.

Q. And they were going to add light?

A. They said all those things, right.

Q. You heard all this and this was on Friday night on the 27th, right after Brian or after Sheehan was found, was Saturday night – Withdraw that.

Friday night, the 28th, the day after Sheehan?

A. What was the day?

Q. You were listening to Count Manelesco?

A. I don't remember what day it was. I remember they were saying those things that you are talking about.

Q. So you figured that you wanted to go down and check the security out and it so happened that you found a defenseless person on the campus?

A. I'm not going to argue with you there.

Q. All right.

Then you got out of your car with the thought and intent in mind what you were going to do is kill the person in the bus stop?

A. Of course.

Q. No question about that?

A. No question whatsoever.

Q. But the primary thing that you had in your mind was [1699] to save your own skin, you didn't want to get caught?

A. Oh, I didn't want to get caught that time because I wanted to be able to do it again and again and again and again.

Q. You don't want to answer my question, do you, Frank?

A. I answered it.

Q. Your primary concern was not getting caught?

A. My primary concern was being able to repeat it.

Q. And not getting caught?

A. No, the act that I was about to commit –

Q. Will you answer my question.

Your primary concern was not wanting to get caught. You took all of those precautions so as not to get caught?

A. Well, why would I want to get caught?

Q. The answer is yes or no.

A. The answer is, of course I didn't want to get caught.

Q. You got into a position where you would be alone with Brian Warford and you got your gun out and you took him unaware, and again, you pulled the trigger –

A. Right.

Q. Again –

A. Right.

Q. And you were a bad shot. Frank, you shot seven times, you hit him once?

[1700] A. I hit him right in the head. That's right.

Q. Then you ran?

A. I put his lights out, one shot.

Q. Then you ran like every other time? You ran like a scared rabbit?

A. Did you see me running?

Q. You didn't, Frankie?

A. I don't remember.

Q. You didn't have time to pick up the shells that day, because you thought somebody would be driving down the street?

A. There was nobody on the street.

Q. You didn't pick up the shells?

A. It was too dark, I couldn't see them. I didn't have no flashlight with me.

Q. You didn't do anything on the 31st, 1st, 2nd, 3rd, 4th, and your girlfriend Bev was over your house September 4th, wasn't she?

A. Sure.

Q. And she said you wanted to give her the Derringer for sex?

A. She was going to buy the gun and didn't have the money.

[1701] Q. So you were going to trade the Derringer for sex?

A. That's right.

Q. So you felt her sex was more important to you than your Derringer?

A. Well, I was going to get rid of the gun anyway, may as well get something worth it for it.

Q. That's right.

So when you told Mr. Shaughnessy that your guns were more valuable than anything else, that simply wasn't the truth, because you were going to give one of your guns up for sex?

A. Just one. I wasn't going to give them all up.

Q. And up to that point, had you sawed your gun up and everything, the .22, taken the slide apart, bought a new gun so you wouldn't get caught?

A. Which one is that?

Q. The one that you shot all the four people with, the one the Detective Reynolds said that the same slide was used for Mr. Rickerson, Mr. Sheehan, Mr. Warford and John Hardaway, the same exact slide?

A. All right. The slide might have been used, the same.

Q. And as you said before, on September the 6th, the handle was in the wastebasket, so you knew after you were arrested on the 4th that you had to do everything you could [1702] to get this one apart and that's what you did, isn't it?

A. No. No. No. The gun was taken apart in July.

Q. So you kept your gun in the wastebasket from July until the police got there September 6th?

A. You know, I had to go out and buy another

gun just like that.

Q. Did you hear my question?

A. Sure.

Q. You kept that gun in the wastebasket from July until the police got there September 6th?

A. No. No. No. Before I kept it in the sewing machine.

Q. And you, same person who told us that the reason you picked up the shells after Timothy Sheehan met his death was because it was too sloppy?

A. That's right.

Q. And you kept that around, according to your testimony, for five months?

A. I kept all the shells when the police come into my house, they found empty casings all over the place.

Q. So when the police came in, that –

A. Wait a minute.

Q. I'm asking you the questions.

THE COURT: Here, just a second.

[1703] THE WITNESS: We know. We saw all the evidence.

THE COURT: Mr. Spisak, just a second.

Put another question.

BY MR. NUGENT:

Q. When the police came in on September 4th, you did what you always do, you lied to the policemen when they came to the door?

A. I did do that.

Q. You told the policemen you only fired the gun once and that wasn't the truth, was it?

A. Whatever the case may be.

Q. So you lied.

And you hid the .22 – or excuse me – the .38, 380 automatic and the Derringer under the cushions because you knew the police were coming up; isn't that right?

A. Well, that's where they used to be.

Q. And you were upset because the police confiscated the .22, .38 and 380 and the shotgun?

A. Sure. I needed those guns.

Q. And then when you got out of jail, after going to jail on September 4th, after you were bonded out, you told Reddish, look, I'm in trouble now, the police are going to know if they check the gun they may know that I'm [1704] I'm the person responsible for these shootings and killings?

A. Sure.

Q. So you have got to get out of town?

A. Sure.

Q. Which is exactly what you were trying to do?

A. No question about it.

Q. You weren't trying to get any messages to anybody? You weren't trying to broadcast the Nazi belief to anybody? You were trying to save your own hide and get out of town?

A. Where did you think I was going to go?

Q. And you say you were going to go to some

place up in Montana, or whatever, it's in the north country where all of the Aryan people like you were?

A. That's right.

Q. So what you were doing is running away again?

A. I was running away so I could fight another day.

Q. You were running away to get away because you were scared because what you have been in – what you had done?

A. Haven't you heard he who runs away lives to fight another day? That's exactly what I was doing.

Q. You were running away because you were afraid of getting caught, nothing about giving your messages to anybody, nothing at all about that?

A. I was giving my messages to people every time I pulled the trigger.

[1705] Q. And you had killed –

A. Every time they picked up a dead body, that's a message, that's a powerful message.

Q. How about Timothy Sheehan, what was the message, that you were stupid? That's your message, wasn't it?

THE COURT: Put another question.

Q. Coletta Dartt, what was the message, that you were stupid?

Reverend Rickerson, that you were stupid?

Those are the messages?

A. How is that stupid?

Q. Now, you tell Bev, "Don't tell the police, don't

tell Detective Oliver."

A. No.

Q. But she does?

A. She came to my house.

Q. September 5th –

A. Let's go back to Bev.

Q. I'm asking you the questions, you don't seem to understand that.

A. Bev talked to the police and she had the piece of paper with Jim Oliver's name and phone number on it, and she said, what should I do, I don't want to talk to this guy, he called up, the guy, while I was gone and said I should [1706] come down and talk to him. She said, I don't want to talk to him, what should I do? You know, women ask you for advice. I told her don't talk to him, so she didn't.

Q. That's what you told her?

A. She didn't talk until they went into her house and picked her up and dragged her down to the Justice Center in handcuffs and made her talk.

Q. That's when you told Bev what you had done, isn't it?

A. I didn't tell her anything.

Q. And the two of you sat there and cried about it, didn't you?

A. Well, we cried because I told her I might have to leave, and she might not see me again. She was pretty shook up about that.

Q. And you cried because now you are going to jail, you are going to be caught?

A. No, I missed her.

Q. So, you showed your manliness again by crying?

A. There is nothing unmanly about crying, even Jesus cried.

Q. You were crying because you were going to get caught then you started, well, we've got to get together with my pal, he was with me, Warford, Hardaway, and the evidence shows he was with you on Sheehan?

A. Run that by me again?

[1707] Q. You get your stuff together?

A. The evidence shows what about who?

Q. Listen to my question.

A. I didn't hear you, you want to repeat what you said before?

THE COURT: Repeat your question.

THE WITNESS: You said the evidence showed something. Run that by me again. I missed that.

Q. Listen to this question, Frankie.

After you knew that you were going to be arrested, after the first arrest, you got together with Ronald Reddish and you started to pack your belongings to go over to his house and that's –

A. Definitely.

Q. And that's what you did, that's where you went.

This is your words, you are going to go to some Aryan place, we know you are going to go to

Reddish's house and you are moving your belongings on September 6th?

A. I went to his house first and after that I was going to catch a ride from his house to the other place.

Q. September 6th, you were in Reddish's car, you were coming back, you were moving things, you see the police?

A. Sure.

[1708] Q. At your house.

You made a decision?

A. How could you not see the police cars, they are parked right in front of the house.

Q. You make a decision that I don't want to go there, turn myself in and tell these folks in the community my message, I don't want to do that, I want to run. So that's again exactly what you do, you run, don't you?

A. Of course. We already went into that.

[1709] Q. And Mr. Westmoreland, Jeff Westmoreland, comes up, you tell him, whatever you do, don't tell the police that you saw me?

A. Sure.

Q. Again, trying to get away, trying to cover up for what you have done?

A. Sure. I want to get away, no question about it.

Q. You go to Reddish's house, and you hope that the police don't come there, but the police do come?

A. That's right.

Q. They knock on the door and you and Reddish

talk and you look outside an you make a decision, let's see if we can fool the police?

A. Right.

Q. And you didn't?

A. No.

Q. So down the basement you went hiding in a little rat cellar, or whatever you were, cowering in the corner, hiding from the police?

A. There is no doubt about it, I was in the basement.

Q. No doubt about that?

A. No doubt about that.

Q. Police came down there, arrested you, pulled [1710] you out, and you told them, which was true, you said you could have shot the police and you didn't because they were white policemen and not black policemen?

A. We could have shot the police, that's true.

Q. If you would have shot the police, then you in turn would have lost your life, wouldn't you, probably?

A. Well, I'm going to lose my life anyway.

Q. At the time, the problem of losing your life –

A. We have all got to go sometime.

Q. You don't want to answer my question, do you?

At the time the problem was losing your life, you didn't want to do that?

A. Sure. I have something to say that has to be said. So rather than shoot myself in the head like Adolf Hitler, when you accused me of being a coward,

I decided it would be far, far better to live, to fight another day, or to take the stand, and tell the world what I have to say.

Q. So when you made that decision, you walked out the house and said, "Officer, here I am, I'm the guy you are looking for"? That's what you did, [1711] wasn't it?

A. Oh, they knew who I was.

Q. That's not what you did, you ran down the stairs and hid in the corner, so you didn't make that decision at that time, did you?

A. We were running to get away.

Q. So you didn't say I want to stand and fight and live to talk, or whatever you are saying?

A. If the police wouldn't find me, I would have been out there still shooting people.

Q. You told us –

A. You can't argue with that.

Q. You just told us the reason that you did not shoot it out with the police, so you could give these people the message, and that's not the reason. The reason you didn't shoot it out with the police is because – so you wouldn't get caught?

A. Mr. Nugent, let me repeat what I said before so that you can get it clearly embedded in your mind.

THE COURT: Lookit. Just answer the question.

The question is yes or no.

THE WITNESS: We did not shoot it out with the police, had nothing to do about being scared.

[1712] Q. That's why you hid in the basement?

A. I hid in the basement so they would not find me.

Q. So not that you could come and give the people the speech?

A. I told you I wanted to continue the war. It's hard to continue the war from a jail cell.

Q. You went to jail and the detective talked to you and, of course, George Rockwell, or whatever his name is, was killed by, I suppose, another patriot in 1967, and he tells you don't talk to the police?

A. That's right.

Q. And that's initially what you didn't do, you didn't talk to the police initially?

A. Initially.

Q. Right.

Then once you got your story straight in your mind what you wanted to tell them –

MR. SHAUGHNESSY: Objection.

THE COURT: Overruled.

Q. You began to talk to the police?

A. I made a decision to talk at some point in time, yes.

Q. You talked to Beavers, you talked to Taliaferro, [1713] and you told them what they have indicated to us, or what Beavers has indicated to us, correct?

A. I told them certain things, some of what they repeated, some was true and some of it was twisted.

Q. And they also told us and you told them that you went to Cleveland State on one day and to check

the security out and you had your gun with you that day like you always did?

A. Sure.

Q. That you were on the elevator and a black male, or female got on the elevator?

A. Female.

[1714] Q. And you made a decision this would be great to kill this person with all this security around and get away with it?

A. Sure.

Q. And you were going to do it according to what you said and a white person got on the elevator?

A. That's right.

Q. So that white person caused you not to kill this black person?

A. That's right.

Q. So you were certainly able to make a decision at that point? You made a decision to kill, then you decided to change your mind and you made a decision not to kill? And that was during the month of August of 1982, wasn't it, that you did that?

A. What date does August end on, the 30th or the 31st?

Q. Was this during the month of August?

A. It might have been in September.

Q. It might have been September 1st. So it might have been after –

A. It happened after Brian Warford, I know that.

Q. After all the shooting, you went and you were checking all the security and during the period of

time you made a decision to kill and then withdrew [1715] that decision to kill and walked away and didn't shoot anybody?

A. I went back there to do what I had to do, continue the war.

Q. And because you thought you might get caught, you didn't do it?

A. It was a technical decision, and under the circumstances, I made a very wise decision.

Q. Now, your pal Richard Esto, let's get back to him.

You knew him in jail, correct?

A. Well, they put him in the same cell block there with me.

Q. You knew that he is, you know, he is a homosexual?

A. He told everybody he was.

Q. And you and he are fast friends, aren't you?

A. What do you mean fast friends?

Q. You write letters to him?

A. No, he writes me a few letters and I answer them.

Q. So you write letters to him?

A. Sure.

Q. You tell him about your feelings about what [1716] goes on in jail?

A. About what?

Q. About the fact that you lost playing cards to some blacks, you weren't good enough to beat them

at cards, they took your cards from you and then you felt bad about that and they threatened you and you felt bad about that and one of the guys wanted to punch you and you got hurt and you had blood in your mouth.

Do you remember that? You don't remember that, do you?

A. No.

Q. So that shows you for what you are, too?

A. You have been reading my mail, huh?

Q. I thought you didn't remember that?

A. So even the mail is not sacred in this place.

Q. You thought you could get away with that. It shows you the kind of person you are when you are one on one, you are – you don't have a gun, you are a winner?

A. It shows what kind of state we have here, like in Russia, you open the mail and read all the mail.

THE COURT: Put another question.

[1717] Q. What if Richard Esto gave us the letter?

A. He gave you the letter? It's no loner the secret police steaming open the envelope and resealing it, now Richard Esto is giving you the letter?

That's very good, very good, Don.

Q. What did you call me?

A. We are on such good terms. You call me Frankie and I call you Don.

THE COURT: Wait. Put another question.

Q. Did that happen in jail?

A. I'm sure.

Q. Did that refresh your recollection?

A. I'm sure you are no doubt exactly accurate on the context.

THE COURT: You answer the questions. You are required to answer yes or no.

THE WITNESS: No, I'll say no to that because he is exaggerating.

Q. Did you write this to your pal Richard?

MR. SHAUGHNESSY: Objection to the characterization of Pal.

Q. How would you characterize your relationship [1718] with Richard then?

A. It's just a prisoner who I knew in the jail and when he went to Mansfield, he continued to correspond with me.

Q. Well, all right. Maybe this will refresh your recollection.

April 1, 1983, did you write a letter to him?

A. I don't remember. Why don't you let me look at that first?

Q. "Dear Rick, It was great to receive a reply from you at last."

MR. SHAUGHNESSY: Objection. He wants to refresh his memory. Let him – give him the document.

THE COURT: Approach the bench.

(Thereupon, a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

Q. Did you write, "Dear Rick, It was great to receive a reply from you at last. I sent you three letters prior to your reply, each came back to me unopened. I thought you got lost, or something, but I had faith you would turn up, again, one day.

"I am real sorry to hear about your new charges [1719] and the additional time you must serve. Thank you for the news and the tidbit about Chico, too. That guy, Danny, who was here on 8-E with me, rode out to Mansfield last week on a 7 to 25. Maybe you will see him some day. The remainder of the people on this part are real 'assholes' and nerds.

"Today I was playing Spades with my white 'partner' against two niggers, our opposition. It was not our lucky day. After we lost the game, the Spooks told us to hightail it and make way for of their nigger pals who wanted to take our place and play. Well, I mean, I mean to tell you, I didn't mind leaving because I didn't even enjoy playing against them. But there was nobody else to play with, you know what I mean. So we, I got up to leave and then those sons-of-bitches had the nerve to demand to keep 'my cards' to play their game with. I said now wait a doggoned minute, that's going too far."

Do you remember all of that stuff?

A. Sounds pretty good. It's getting better as we are going on. Read the whole thing all the way.

Q. "Well, you should have heard them. Those monkeys called me a racist."

[1720] A. That's right.

Q. "A no good white motherfucker, et cetera."

A. Yes.

Q. "I was trying to ignore them and was halfway

to my room with my cards when one jumps up and runs after me.

"What you wanna do? You tryin' to start something? he asks threateningly."

"I don't give in easy to threats and blackmail, but neither do I like trouble and violence. I am basically a non-violent person and abhor fighting."

A. Absolutely.

Q. You said that, didn't you?

A. Sure, that's what I wrote in the letter there.

Q. That's a lie?

A. No. Keep reading the rest of it.

Q. That's a lie, isn't it?

A. No, it isn't. You do lie?

MR. SHAUGHNESSY: Objection.

THE COURT: Sustained.

THE WITNESS: Keep reading the letter, see what happened.

Q. You do like violence?

A. I'm a very non-violent person.

Q. You shot five people, that's violent.

[1721] A. I don't see what's violent about it.

Q. "I am basically a non-violent person and abhor fighting and bloodshed, but before I could explain all this to him, he rams his fist into my jaw and almost cracks the side of my head open. My teeth shatter and blood filled my mouth."

You didn't fight back?

A. Keep reading the letter.

Q. You didn't fight back?

A. Keep reading the letter.

Q. You want to answer my question?

A. You read the letter.

THE COURT: Just answer the question.

Q. You didn't fight back, did you?

A. No, I didn't.

Q. Because you knew he was a better man than you?

A. In the jail they punish people for fighting.

Q. "The really amazing thing is I'm thinking of Jesus at the time and it doesn't even occur to me to hit him back."

A. That's right. I had good thoughts in my mind, that's what the letter said.

Q. If you hit him back, he would hit you back?

A. I already admit once I did nothing to provoke [1722] that. It was an unprovoked attack.

Q. "I just stand there holding pieces of my teeth in my hand."

A. Yes.

Q. "And spitting blood and praying somebody will come and stop him before he kills me or hits me again."

A. That's right.

[1723] Q. So you pray rather than fight back?

A. Yes. Prayer is a very powerful weapon.

Q. "The C.O. on duty comes when he hears the noise and commotion and I am locked up and given

eight hours for fighting"?

A. I think that was right.

Q. You didn't have a chance to explain to him you were the innocent person in that one, did you?

A. That's right.

Q. So when I questioned you earlier about saying that in the letter, I was inaccurate, wasn't I?

The man did come up and punch you and you did have blood in your mouth and your teeth were cracked?

A. There is no doubt about what's written in that letter.

Q. Again the document doesn't lie, just like what the officer said doesn't lie and the testimony doesn't lie—

MR. SHAUGHNESSY: Objection, "just like."

THE COURT: Sustained.

Q. "All the cannibals congratulate their brother who is a hero hitting me and winning the fight against the evil, bad, racist little nasty Nazi white boy who wouldn't share his cards with the [1724] nice, peaceful, non-violent niggers"?

A. Amen, Brother.

Q. So you are blaming them for your problems again?

A. Well, anybody that reads the letter, it's clear what happened.

Q. And you are blaming them for what happened?

A. Right on.

Q. "My jaw is still sore right now. I am going to have to go to the dentist. I will probably end up losing one, two or three teeth. It isn't fair, Rick.

"I hate the black bastards. They are loud-mouthed, arrogant, ignorant and not worthy to be considered 'human beings'. They are lower than animals because an animal will not attack people without reason. This guy had no good reason to hit me except I'm white. Ninety percent of their people have no good reason for anything they do. The ape who punched me is typical of his breed and I'm not sorry in the least for shooting at and killing several of them. In my opinion killing those niggers was the finest thing I ever did in my whole life. I pray to mighty God in heaven I wish I had a human submachine gun right now so I could exterminate [1725] every single one of those kinky-haired mother-fuckers in this jail just like Hitler's Nazi SS soldiers did to all those poor Jews in World War II. I would like to fill a trench with their naked black-ass bodies and watch them scream and twitch in agony as I fired rapid bursts of nine millimeter bullets into the withering, gooey, black mass."

You have to justify that, don't you?

A. Gee, you're reading it pretty good. Keep on reading.

Q. Do you understand my question?

You want to justify what you just said to your friend, you wanted to justify what you just said, didn't you?

MR. SHAUGHNESSY: Objection, your Honor. He either reads the letter or he asks questions, but not both.

THE COURT: The objection is sustained.

Q. "Lest anyone accuse me of unGodliness, let me remind you of the story of the Prophet Elijah who slayed 850 followers and Prophets of Baal in a single day, 1 Kings 18:40. Can't read the whole chapter anyway. Who forgets the story of mighty Samson who killed 1000 Phillistines in a day's work, [1726] Judges 15:15-17.

"Young David from Bethlehem, later King David, killed Goliath, then chopped his head off. Even Moses, the only man who has ever talked to God face to face (on the Mountain at Sinai where he received the Ten Commandments) was guilty of shedding the blood of another, Exodus 2:12.

"God did not condemn these men for their violent acts, in fact, he rewarded them by making them his servant, spokesman, leaders, kings, Prophets, Judges, et cetera.

"All these men were guilty murderers and killers, and yet they were rewarded with immortality for their great deeds and our history ranks them among the great men of our religion.

"In Psalms (149-6-79) we read: Let the high praises of Yahweh be in their mouth. And a two-edged sword in their hand to execute vengeance upon the heathen and punishments upon the people: To execute upon them the judgment written; this honor have all his saints, praise ye Yahweh."

So Tim Sheehan was your punishment for that?

A. There will be no punishment for that.

Q. Because you were mistaken?

A. That's right.

[1727]Q. And God forgives mistakes?

A. He will forgive. Yes, God forgives.

Q. "Adolf Hitler said much the same thing in Mein Kamph (My Struggle) by defending myself against the Jews I am fighting for the work of the Lord.

In the spirit of Elijah who cast 850 Prophets of Baal to their doom at Kishonbrock, Adolf Hitler, a modern day Elijah sent six million anti-Christs to their just fates in the gas ovens at Auschwitz, so too, I believe I can bring no greater glory and honor to the living God in heaven than to slay these vile, filthy, foul-mouthed Pagan, Devil-worshipping illegitimate black bastard sons of Satan, and I believe the more of them I kill the greater the honor I bring to my Lord.

"The Lord can reject my truths and persecute me and execute me as it has all the Prophets, even Jesus, before me. But my Bible tells me soon the Lord will return to this earth and he will finish the job started as King of Kings and Lord of Lords, he will be coming to judge, wage war, and kill, Revelation 19:11, 16:21. Then our Lord shall utterly defeat and crush the forces of darkness and bring in his reign, the millennium, 1,000 years of perfect [1728] peace and love undisturbed by intruders from across the sea in Africa.

"Love, Frank."

Is that the letter?

A. Heil Hitler.

(Witness demonstrates Hitler sign.)

I couldn't have said it better myself.

Q. You did say it yourself.

A. Yes, I did. I stand by every word that's written in that letter. I will stand by it until the day I die.

Q. Frank, let me ask you this. You believe in Jesus. You believe there is a justification for your conduct.

Do you remember the Ten Commandments, the two greatest Commandments are, "Love the Lord, Thy God, with all Thy heart and Thy neighbor as Thyself."

A. That's what it says.

Q. That is not what you are doing?

A. (No response.)

MR. NUGENT: That's all, Judge.

THE COURT: Okay. We are going to lunch.

Lookit. It's a little late. Why don't you be back downstairs at two o'clock and we [1729] will try to have you come back up here at 2:15.

Please remember the admonitions.

- - - - - -

(Thereupon an adjournment was had until 2:15 o'clock p.m., Friday, July 8, 1983, at which time the following proceedings were had:)

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Supreme Court, U.S.
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No. 08-724

In the Supreme Court of the United States

KEITH SMITH, WARDEN,
Petitioner,

v.

FRANK G. SPISAK, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX – VOLUME II

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TESTIMONY OF
FRANK G. SPISAK, JR. (continued)

[1730]

FRIDAY AFTERNOON SESSION, JULY 8, 1983

THE COURT: Okay, be seated. Mr. Shaughnessy, do you have any redirect?

MR. SHAUGHNESSY: Just a few questions or two, your Honor.

THE COURT: We're going to hold you to that.

MR. SHAUGHNESSY: Sir?

THE COURT: We're going to hold you to that.

MR. SHAUGHNESSY: The questions are in several parts.

REDIRECT EXAMINATION

BY MR. SHAUGHNESSY:

Q. Frank, this morning Don or earlier this afternoon Don Nugent read a letter to you and he said that was your letter and he said the letter – well, we have heard the letter and it kind of speaks for itself.

He kind of equates that to saying that goes to prove you and Ron Reddish were there at Cleveland State University and you killed Mr. Sheehan; do you remember that line of questioning?

A. I remember the line of questioning, but I don't see [1731] the connection between the letter and Ronald Reddish.

Q. Sure. He told you that the letter, you could

read the letter, the jurors could read the letter, we could all read the letter and the letter would speak for itself.

He said that was kind of like what you said to the police when you talked to the police, right? Do you remember that?

A. Did he say the things that were in the letter were the things I said to the police? I missed that part.

Q. He said it was kind of like the things you said to the police; didn't he say that?

A. I would have to look at the transcript.

Q. Well, now, Frank, the things you put in the letter you could read the letter back to us right now, couldn't you?

A. Just about word for word.

Q. You could read it word for word?

A. Yes.

Q. And we could give the letter to Judge Sweeney, and Judge Sweeney could read the letter right now, couldn't he?

A. Oh, yeah.

Q. We could give the letter to Mr. Nugent and the letter presumably, he could read the letter as he read it [1732] before, right?

A. Sure.

Q. Now, Frank, in your home you had some tapes of Adolf Hitler, didn't you?

A. Yes.

Q. You had some tapes of important people,

people to the cause that you expouse, right?

A. Yes.

Q. And you like to have those tapes, you would like to have those tapes?

A. Yes, indeed.

Q. You would like to have those tapes back?

A. Yes. They are very valuable to me.

[1733] Q. If they give the tapes back to you, you would like to have them, wouldn't you?

A. Yes, sir.

Q. Don said to you, Frank, he said, you made a tape and you sent it to your wife and on that tape you asked her to do something, like come back to you, right?

A. That was the general tone of the tape.

Q. And then he said, well, your wife made a tape on the back of that tape and she said some things and then he cross-examined you as to what she said, right?

A. Yes, he did.

Q. Can we presume, Frank, that somewhere among the possessions that you have, you have a tape recorder?

A. Tape recorder?

Q. Yes. Do you have the tape recorder?

A. No. There is no tape recorder in there.

Q. There's no tape recorder here in court, in the courtroom, but back there on 53rd Street, did you have a tape recorder there?

A. I had three of them.

Q. You had three of them?

A. Yes. They were part of my stereo equipment.

[1734] I had a large amount of radio equipment set up there in my living room.

Q. Can we presume since you sent your wife a tape and she sent a tape back that your wife has a tape recorder also?

A. Yes. Her and I shared the tape recording interest.

Q. Sure. You taped her a message and then you would get a message back. You would speak to her one day and she would answer back the next day?

A. Yes, sure. It's voice letter, I think that's what it's called. Voice letters.

Q. You got three tape recorders, are they all the same kind?

A. Two are cassettes and one was an eight track

Q. Let me ask you about the cassette.

Do you know what kind it was, who makes the tape recorder?

A. Well, Japanese make them.

Q. Japanese?

A. Yes.

Q. Do you know the brand, was it a Sony or something like that?

A. I had Radio Shack.

Q. Radio Shack?

[1735] A. Yes.

Q. Did you buy it at Radio Shack?

A. Yes.

Q. What did you pay for it when you bought it?

A. I had one $300 and one that was $88, it was on sale.

Q. The $88 one that was on sale?

A. Yes.

Q. Now, Don said to you a number of times from yesterday until he finished up on cross-examination of you today about those things that you had said to the police, right?

A. Yes. We went into that in some detail.

Q. And when you talked to the policemen, you talked to Detective Beavers, Detective Patton, they all told you, now, Frank, you don't say anything, but if you say anything we are going to use it against you in court; they told you that, didn't they?

A. Sure. They always say that.

Q. Sure, they always say that.

A. Even if a person doesn't say anything, they still say that.

Q. They are required by law to make a statement [1736] to the person.

Q. You probably knew they were going to say that before you even got arrested, didn't you?

A. Sure.

Q. And they told you anything you said could be used against you in court, right?

A. Actually we learned that really anything could be used against you. You can bring in the T-shirt

like they did here.

Q. They can bring even your T-shirt as it was used against you should they want to do that?

A. Sure.

Q. When they arrested you, they said, you don't have to say anything, that's your constitutional right, you don't have to say anything, but if you do tell us how you killed Reverend Rickerson, if you tell us how you tried to kill John Hardaway, and if you tell us how you killed Mr. Sheehan, and how you killed Mr. Warford, if you tell us these things, we are going to use those things against you; they told you that, didn't they?

A. Well, they didn't go into specifics and say if you tell us how or even for that matter if you tell us why, they just said anything.

Q. Anything. You said a lot of things, didn't [1737] you?

You talked for about five or six hours, didn't you?

A. Sure. We talked about the case and then we would shift and talk about the baseball game or something like that, it was back and forth.

Q. Back and forth?

A. Sure.

Q. My good friend Detective Beavers, did he say, I want to get this down word for word because we are talking so long and I'm going to turn on this $88 tape recorder and then, you know, nine months from now or ten months from now we will be doing a lot of other things and we may all forget what we said today, so I'm going to put one of these dollar and a half tapes in here and I'm going to make a tape

recording, did he do that?

A. No, sir, he did not.

I think the policemen came up here and testified they didn't do such a thing.

Q. Now, you were talking to Detective Timothy Patton and you talked to him for a long time, didn't you?

A. Oh, yeah.

Q. Detective Patton is a pretty nice guy, isn't he?

[1738] A. He tries to project himself that way.

Q. You found him to be a pretty nice guy, the fact of the matter is, you eventually put his name on the T-shirt, the T-shirt that is to hang in the police station dedicated to the detectives for the good job they did in arresting you?

A. Well, to tell you the truth, there were so many good cops in there, I couldn't think of all of the names and I'm sure if I could think of all of the names, there wouldn't be room on the back of that T-shirt, so I just put the names on there that I could think of. I had to kind of discriminate, if I'm using the right word, I had to discriminate and put down just a few names, you know.

Q. That word "discriminate", you can use that a lot of different ways?

A. Right.

Q. And you can select the very cream of the crop, my pal Harvey Beavers, Timothy Patton, Lieutenant Rudolph, you discriminated and you took the very best people and you put their names up there and that will be there forever, won't it?

A. I certainly hope so.

Q. You certainly hope so.

Anyway, did there come a time when [1739] Timothy Patton said, you know, Frank, we're talking about so many things, all these people that you told us about that you killed and all the guns that you have told us about, all the things that you told us about the Nazi Party, why don't we just put this down on a tape recorder because if we put it on the tape recorder, you know, nine months go by and we will still know exactly every word that we said; did he do that?

A. No.

Q. Did he ever come to you and say, well, I want you to hear something back, did he ever come and say that to you with a little machine?

A. Yes, he did.

Q. Did he play it for you?

A. Yes, he did.

Q. Did you hear something when he turned it on?

A. Yes, I did.

Q. What did you hear?

A. I heard myself talking.

Q. And what were you saying, Frank?

A. I don't remember. I was saying something about – it was obviously some conversation that I had had with them in that little interview room with the refrigerator and the microwave and all [1740] that fancy stuff.

Q. Now, Don Nugent talked to you for quite a long time, didn't he?

A. Right.

Q. He talked to you – you talked to the police for quite a long time and right from the beginning you said you killed Reverend Rickerson and you felt pretty good about it, didn't you?

A. I told who that?

Q. You told the police that, didn't you?

A. I told them that I did it, but I don't think we went into the feelings and all that.

Q. You didn't do that.

In any event, you told them that you tried to kill John Hardaway, didn't you?

A. They didn't even know about that until I told them about that.

Q. All right.

You told them that you took a shot at Coletta Dartt, didn't you?

A. I sure did.

Q. You told the doctors, the psychiatrists, that you talked to, you told them about taking a shot at Coletta Dartt, didn't you?

A. I sure did.

[1741] Q. Don read you that back this morning because they were talking about the white people's Socialist Party and you didn't like that, isn't that what you told them?

A. Well, I heard them talking about that.

Q. Incidentally, did the doctors that you talked to, the State doctors, did they have tape recorders?

A. They might.

Q. Anyway, somewhere along the way you told

the police and you told the doctors and you told anybody that would listen that you killed Mr. Sheehan, didn't you?

A. Sure.

Q. And somewhere along the way you told anyone that would listen, the police, the doctors, the psychiatrist, that you killed Brian Warford, didn't you?

A. Yes.

[1742] Q. All right.

You heard all of the witnesses that came in here. You heard the man that came in and three men or two men said they went out and picked up some fingerprints.

You heard that, didn't you?

A. The fingerprint man, yes.

Q. Sure.

And then another man came in and said I'm the scientific investigation unit, we have this process and that process, and we compared the fingerprints? You heard that, didn't you?

A. Sure.

Q. And then another man from the same unit came in and said, now we have this fancy microscope, and you can view two things at one time, he called it a comparison microscope?

A. Yes, I'm aware of that.

Q. All right.

And you have seen, you heard and saw other people come in here and say about this elaborate proceedings and process and so forth, you heard all of

the 60 or 70, however many witnesses, right?

A. Yes.

Q. All right.

They all, or a lot of them had some equipment and some [1743] comparison microscopes, and some things that he worked with, right?

But when the policeman came in here and said what you said, or supposed to have said, nine months ago, they didn't have a whole dollar and a half piece of tape to say here is what we really said, did they?

A. No.

Q. All right.

And is what you told Don, is that what you told the police back in September?

A. What did I tell Don?

Q. Well you gave Don some answers this morning. Were you truthful this morning?

A. Yes, I tried to be.

Q. All right.

Don talked to you about a number of things. He said to you early on in your conversation with him yesterday that you didn't even support your wife.

You remember those questions, don't you?

A. Yes.

Q. And do you know why he asked you those questions?

[1744]A. I think I know why he was bringing those subjects up.

Q. All right.

And you had trouble with your wife, didn't you?

A. Sure.

Q. You made no bones about that, did you?

A. I didn't make no bones about that.

Q. All right.

Anybody ask you if you had trouble with your wife, you would be glad to tell them, wouldn't you?

A. Sure.

Q. Anybody ask you if you killed Brian Warford, and how you felt, you felt good afterwards, you would tell them you felt good, right?

A. Sure. The only difference is I'm on trial here for the Brian Warford thing, I'm not here because of the trouble I had with my wife.

Q. Yes.

The trouble you had with your wife, that was disposed of across the street in the domestic relations court where the judge said to you, Francis, you are going to have to pay $35 a week; isn't that right?

A. $35.70.

Q. Well, the 70 cents, that's the money that is kept over, they call that poundage; isn't that right?

[1745]A. That's right. That's right.

Q. And every week, come rain, come shine, whatever, the paymaster at the Daniel Company took $35.78 out of your paycheck; isn't that right?

A. Yes. And the reason that was done under the court order was to prevent any misunderstandings

from arising in the future should anyone accuse me of non-payment. Okay. Or if the wife, perhaps, was to come and say he is not paying support. That eliminates that because the payment is made automatic from the employer where I work to the Bureau of Support, which is part of the courts, I think. I might be wrong about that.

Q. All right.

And then Don, you told Don, didn't you, that the pay slips are somewhere in there and they would prove that?

A. Well, they might be in there or they might be still be back on 53rd Street for all I know.

Q. All right.

And Don asked you something, he asked you something about, something that was on a tape recording, something that your wife had said, something about the non-support.

Do you remember where that tape is?

A. That tape might be in there along with the stuff. If we were to look, we might find it.

[1746] Q. Sure.

If Don wanted to get a recorder, maybe he could borrow one from the police, if he wanted to get one and bring it in here and play it, you wouldn't object to that, would you, if you were on trial for non-support?

A. If I was on trial for non-support. That still wouldn't prove non-support. The thing that would prove it is if they got the records from the Bureau of Support, that would show whether I was paying or not.

Q. Sure.

And they are all over there across the street, aren't they, in big ledger books?

A. I suppose if you issued a subpoena for those records, they would have to cough them up.

[1747] Q. All right.

So first he said that Frankie – he said – your name is Frank, isn't it?

A. Frank.

Q. You don't call him Donnie, do you?

A. No.

Q. Because you are in a court of law, you call him Mr. Nugent?

A. I prefer to call him Mr. Nugent.

Q. Sure.

And you suppose there was a reason why he called you Frankie?

A. He wasn't trying to be my friend.

Q. All right.

A. I think he was being sarcastic when he said that.

Q. Do you think maybe he was being sarcastic?

A. Just a little bit I think.

Q. All right.

And anyway, along the way, he said something to you, your haircut, and you tried – you got your hair cut because you wanted to come in here, apparently, and fool everybody.

Did you get that haircut so you could come in

and fool these nice people?

A. No, I got my hair cut because it was too long. When [1748] I was first brought in here, the jail, my hair was pretty long. After the picture showed, after nine months, it was down here.

Q. Kind of getting on your shoulders?

A. It was unmanageable. I had to wash it and comb it all the time. It could be too much trouble when I went to court. So I went up there. I told the barber to cut it. I told him to cut it nice and short.

Q. Incidentally, in the jail they don't just let you walk around from floor to floor, do they?

A. No.

Q. Do they have a place in the jail where you kind of come down an elevator or something, and they have a pole there, with a red and white stripe on it, and a guy says, Mr. Spisak, would you like a razor cut today, or would you like – whatever it is?

A. Not really.

Q. Who are the people that cut your hair in the jail?

A. The inmates.

Q. Inmates.

And undoubtedly they are licensed barbers that somehow ran afoul of the law?

A. Not actually.

Q. They are guys that can handle the scissors, right?

A. As long as they can put the soup bowl on the head with one hand and hold the scissors with the other hand, they've got the job.

Q. So you didn't have a whole lot to say about how the hair got cut?

A. No, not really.

Q. But the moustache here, you didn't grow that to fool anybody, did you?

A. No. They know who I am.

Q. Sure.

And you ever wear a moustache like that before?

A. Sure.

Q. And you have been a Nazi for how long?

A. Well, I'm 32 years old and I was 14 when I started, so that would have to be about 28 years, wouldn't it?

Q. You have been a Nazi –

A. Or 18 years.

Q. -- for 28 years?

A. 18 years.

Q. And a few months ago, if we were to have gone over to your house and we went into your house, the most prominently displayed picture in a gold frame would have been a picture of the Fuehrer, Adolf Hitler, right?

A. Sure.

Q. It wasn't a picture of mom or dad out there, was it?

A. No.

[1750]Q. And you love Adolf Hitler, don't you?

How do you compare Adolf Hitler to your dad,

as far as your likes or dislikes?

A. There is no comparison there.

Q. You like your dad, don't you?

A. Sure.

Q. But you love Adolf Hitler, don't you?

A. Well, I love them both, at least technically.

Q. You love them both and it's technical?

So you –

A. Incidentally, if I may interject one more business about the haircut.

THE COURT: Here, just a second. You can't interject, he has to put a question.

Put a question.

MR. SHAUGHNESSY: Excuse me.

Q. Would you interject one more thing about the haircut?

A. Sure. When he said about I was trying to change my appearance because I had a shorter haircut than I got in the picture when the police took it there, I got a picture from my family album here shows me about, oh, I would say five or six years ago, my daughter is only about one years old there, and my hair is a lot shorter than it is now.

[1751] Q. All right.

So you had short hair before?

A. Sure.

Q. And the picture proves that? Like a tape recording, dollar and a half tape recording, would prove what you really said, or didn't say, when you

talked to the police, right?

A. Sure.

Q. All right.

Now, Don Nugent spent some time, Frank, talking to you about homosexuality.

A. Yes, he did. He tried to –

Q. And why do you suppose, why do you suppose, Don Nugent talked to you about homosexuality?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. But he did anyway, didn't he?

A. Sure.

Q. And are you –

A. He tried to.

Q. Are you a homosexual?

A. No.

Q. Now, Frank, there was a time in your life you told us about yesterday when you talked to some people about getting a sex change, wasn't there?

[1752] A. Sure.

MR. NUGENT: Objection.

THE COURT: Overruled.

[1753] Q. Were you a homosexual then, or did you do homosexual things then?

A. I was doing homosexual things then. I was pretty mixed up and confused.

Q. All right.

Why were you mixed up and confused?

A. I don't really know why.

Q. Now, Don said somewhere along the way, and well, kept saying to you, like, when you got out of work that you were blaming somebody else, and you weren't blaming somebody else, were you, when the economy went bad and you lost your job?

A. I wasn't blaming anyone, but it is a fact.

Q. Sure.

It just happened, didn't it?

Now, did you blame anybody for being mixed up and doing these homosexual things, whatever homosexuals do, and we won't ask you that?

Do you blame anybody for that?

A. Well, yes. In a way I do, because the society we are living in, the society is so permissive and they permit all this pornography and all that influence and all the psychiatrists are always saying that there is nothing wrong, that that's normal. It seems like they are trying to push that on people's [1754] minds.

Q. They are trying to push it on your mind, weren't they?

A. Yes.

Q. All right.

Who tried to push it on your mind?

A. The Jews were trying to do it.

Q. The Jews. Any particular Jews?

A. The ones that control the news media and the book publishing and the magazine industry. Whenever you pick something up, it's got something about gays in there, about homosexuals, and you see

in Boston there are 17,000 of them marching in the streets. And out there in San Francisco and in California they are taking the whole city over.

Q. All right.

A. I'm saying there is a tremendous influence nowadays. They are trying to push it down people's throats and get them to accept it. And one cannot help but to be subjected to these influences when you are living in a society and it is all around you.

Q. Why, certainly, Frank.

Do you think there is a reason that these people that control things are trying to push homo-[1755]sexuality on us?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, in any event, you kind of see yourself as a victim of all of that and that's why you got kind of disorganized and kind of misguided there for awhile?

A. I think I was lost for a long time.

Q. How long were you lost, Frank?

A. About a year.

Q. About a year you were lost, and during that time you frizzed your hair occasionally, and you put on some eyeliner?

A. Probably all the time during that time.

Q. And you didn't have a mustache?

A. No.

Q. And you wore some ladies' clothes and you were lost for that time?

A. Sure.

Q. And during that time you weren't thinking about killing black people, were you?

A. No, but there were a lot of them that were trying to kill me.

Q. There were a lot of people that were trying to kill you.

[1756] And while you are not on trial for being a homosexual, if you were asked, you would tell us that you were lost for a year and you did some homosexual things, right?

A. Sure. I can't deny that. All right.

Q. And homosexual things, that's doing some sexual thing with other men, isn't that what it is?

A. That's a sin.

Q. All right. And it's a sin.

And Don asked you something about the Bible, does it say something in the Bible, it says in the Bible, doesn't it, that it is a sin. You told us that this morning, and that the result of that, or that people who are homosexuals are going to die for that?

A. It's in the Bible.

Q. All right.

A. I can show you exactly where it is.

Q. What does it say? Just without looking at your Bible.

What does it say in the Bible?

A. It says that homosexuality is an abomination to God and that the punishment for it is death to both parties involved.

[1757] Q. The punishment is death.

Presumably, then, and I think Don asked you this question, that you at some time expect to be punished for a homosexual, then?

A. Well, I could have been killed, or God could have taken my life any time that I was doing those things and it was a miracle that I didn't die.

Q. Do you think there was a reason that you didn't die?

A. Yes.

Q. And what was that reason?

A. The reason was that God knew that I would turn around and I would be saved. He wanted me to pull through it. And he wanted me to do something about it, when I came out of it, and if necessary, get up and testify to the whole world what is going on.

Q. All right.

And you are testifying to the whole world, aren't you?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. All right.

You are willing to answer my questions, or Don Nugent's question, or Patricia Cleary's [1758] questions? You are willing to answer those questions, aren't you?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. All right.

And you are not really homosexual, are you?

A. No, sir.

Q. All right.

And have you done any homosexual things, whatever they may be, since that year that you were lost?

A. No.

Q. Now, you told us that, or Don Nugent told us, I forget –

MR. NUGENT: Objection, your Honor.

THE COURT: Sustained.

MR. SHAUGHNESSY: I don't remember who said it.

Q. Frank, it was suggested that you were jumped and you were beat up, you were robbed by some black people and you are not really a Nazi at all and the reason you went out to kill black people is to get even.

Would you tell us about getting jumped, or [1759] robbed, or beat up, or whatever it was?

A. You want me to tell you about getting jumped?

Q. Well, when did it happen?

Who jumped on you?

A. Well, there was a gang of them, about three or four. They were in a car. I was walking down 17th Street.

Q. Now, when did this happen, Frank?

A. Back in '79 maybe.

Q. Was this during the time that you were lost, that you were doing homosexual things?

A. I think it was after then.

Q. It was after that.

Well, tell us what happened?

A. Well, I was on my way home from Cleveland State where I had been reading in the library, and I had a bunch of books, and papers under my arm. And I was walking down 17th Street. Here comes a car, pulled up to the curb, real quick, they slammed on the brakes, and two or three of them jumped out of the car, one grabbed me by my arms and a third guy started hitting me over the head and in the stomach and everything. They were dragging me to the car. One got the hands around my neck and started to [1760] squeeze and choke me. And they were saying, you white son of a bitch, we are going to kill you. And they were kicking and punching me and everything.

Q. All right.

And you didn't like that, did you?

A. I was pretty scared, I tell you the truth.

[1761] Q. Did that influence your decision to kill black people?

A. Not right away.

Q. Did it ever influence your decision to kill black people?

A. Sure. Because I continued to hear about this and read about it, other people being attacked and they were only being attacked because they were white.

Q. Now, Frank, you said that you didn't want to get caught by the police because you wanted to keep the war going; do you remember that testimony?

A. Sure.

Q. All right. You knew if the police saw you shooting a black person, that they would arrest you, right?

A. Sure.

Q. You knew that?

A. Well, it's like over in the Middle East, the Israelites are fighting against the Lebonese and they send the UN people to keep the truce and then the two sides started shooting at each other over the UN and they were trying to break it up.

That's jus what the police force here represents. The UN was trying to keep the truce, keeping the truce, they were trying to stop the war between the white and the black.

[1762] Q. And you were trying to do a good thing in your own view, you were trying to keep the war going and the police would interfere, is that what you're saying?

A. Well, what's happening is the other side, the black people are always attacking the white people and I think there is more of them attacking the white people than the white people attacking them.

Q. And you think you ought to change things around a little bit?

A. There has got to be some changes or it's going to be – it's going to end up by wiping the other side out.

Q. You told us about the time you were jumped on on 17th Street; were there other times you had some problems?

A. Yeah. There was a lot of times.

Q. All right. Did the other times, the lot of other

times, did they involve black people doing things to you?

A. I never been jumped on or shot at by a white person.

Q. Don Nugent said something to you yesterday and earlier in the conversation about the girl by the name of Lawandowski.

A. Yes, I heard the name.

Q. Do you remember that's the name he mentioned?

A. Yes, I read something in the transcript.

Q. I forget the first name, what was the first name?

A. I think it was Marion.

[1763] Q. Was it Mary, Marion, or what?

A. Well, I remember the name Marion.

Q. But I believe he said Lawandowski.

A. Yes. He said something about Lawandowski being a Jewish girl.

Q. Do you remember that?

A. I remember him saying that.

Q. Did you search your memory of those people that you knew in high school?

A. Indeed.

Q. Incidentally, if you know is Lawandowski a Jewish name or Polish name?

A. Well, it sounds Polish to me.

Q. You lived in Parma Heights and Middleburg Heights, Right?

A. Yes.

Q. There's a lot of Polish people living in Middleburg Heights, is that right?

A. That's right. I would say offhand that I don't think there's many Jews in that suburb because if there are, I don't remember because there's no synagogue being in the community and naturally if there's a few Jews there, they would be going to the temple.

Q. Do you remember anybody by the name of Lawandowski in your high school class?

[1764] A. I can't remember the name.

Q. Don referred to an incident at high school, the high school dance or something like that where a girl brought a black man to the dance; do you remember anything like that or did that just not happen?

A. He may have said that, but the only dance I went to in high school was the Winter Snowball.

I don't remember anything like that happening. I had a pretty good time there that night at the Winter Snowball.

Q. You would remember if something like that happened, you would remember that, wouldn't you?

A. I think so.

Q. Was there something, and I'm just taking it from your answer from the stand, you said something about something being in the newspaper like that?

A. Yes. After I was arrested, the Plain Dealer published a whole series of articles about me and there was something mentioned in the Plain Dealer about a woman who had made a comment about

that, but it didn't have her name in the newspaper so I was thinking at the time I read it that it was a fabricated story made to make me look bad.

Q. Don Nugent apparently didn't read the newspaper.

A. Apparently.

[1765] Q. But that never happened?

A. No, it didn't.

Q. What was your attitude in high school about the mingling of races, do you have an opinion on that?

A. Yes, I do.

Q. What was your opinion back when you were going to school, what was your opinion when you were going to the snowball dance and during that sort of thing?

A. Well, when I was in school, when I was a high school student, my opinion regarding the mingling of races was that they should be kept separate, and I believe like Abraham Lincoln and our first five presidents believed, the blacks should be repatriated back to Africa.

Q. You believe that and undoubtedly if there was a girl by the name of Marion Lawandowski or Marion Lawandowski and she brought a black man to the school, you might very well have commented, but it just didn't happen, right?

A. I don't think I would even comment about that if she had brought a black man to the school had that incident happened.

Q. You would not have commented about it?

A. Well, I certainly would have made known my

beliefs, I would have made my beliefs known and I would have made it a matter of public record.

I was very outspoken in high school.

[1766] Q. Don said to you some things about this Alice Davis. Tell us about Alice Davis.

A. Alice Davis?

Q. Yes.

A. Okay. She's 31 or 32 years old white female. She moved into the building that I was living in back in October of 1980 – let's see, 1981. She was living downstairs and I was living upstairs. She had a six year old son.

Q. You heard Don say a lot of things about Alice Davis, what Alice Davis said, Alice Davis says this, and Alice Davis says that, Alice Davis did this and Alice Davis did that.

When is the last time you ever saw Alice Davis?

A. I saw her a few minutes ago.

She was standing right behind those doors out there. She was looking at me.

Q. Well I'll be darned.

What does Alice Davis look like?

A. She's a pretty big woman.

Q. Pretty big woman?

A. Yes.

Q. And the thing that I was kind of driving at, there was nothing wrong with Alice Davis, she could come down here and walk in the room and sit down here and talk, couldn't she, if she did, she could come

down here and say all of those things?

A. Yes. She could come in here and talk, sure.

Q. What would the line be now that she probably is going to come in here and talk when we get finished talking to you?

A. Well, I'll just go sit down and listen to what she is going to say.

Q. And she is going to say some things to you, some things you said to her, right?

A. Yeah. We had conversations.

Q. Now, some time later in the conversation Don said to you about that young lady named Bev Murphy.

A. Yeah.

Q. Tell me before I turn around, if you will, if she wasn't just peeking in the back door?

A. I haven't seen her.

Q. You haven't seen Bev lately?

A. No.

Q. You liked Bev a lot, didn't you?

A. She was a nice person.

Q. Was there something this morning about the little Derringer that you had, did you say something this morning that you were going to trade that Derringer for some sex?

[1768] A. Yes, Don did bring it up.

Q. Don Nugent brought it up?

A. Yes.

Q. Now, if he brought it up, it probably was true

then, wasn't it?

A. Well, I'll tell you the story as I know it. I'll tell you the story as I know it and everybody can judge it for what it's worth.

Q. Well, tell us what happened.

A. Well, a young lady kept pestering me for a long time to give her or sell her the derringer because she wanted to put it in her purse for protection. So at first I didn't want to part with it. Then when I was laid off from work, it was a little rough not having a steady income like I used to have.

So then I told her that I would part with it for $50. I knew she had the money. She was going to give it to me, but like a lot of women do, they try to use their wiles to bewitch you and she was trying to get me to part with the gun, part with the derringer for nothing, if you know what I mean.

Q. Are you pretty easily beguiled or bewitched?

A. Well, I'll tell you this. If the police hadn't broke down the door that Saturday morning and come in there and got me and all my guns, I [1769] probably wouldn't have the derringer anymore.

Q. And the gun was pretty important to you, wasn't it?

A. Yes, it was.

Q. So you would like to put that gun in your hand and you would like to wrap your fingers around the gun and feel the power in that gun, you liked to do that, didn't you?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Did you like that gun?

A. Yes.

Q. What did you like to do with that gun?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. I liked to look at it a lot.

I had another one just like it but it was half the size. It was just like a cigarette lighter.

Q. The derringer, over and under .38, what did you like to do with that gun?

A. Well, when I wasn't sitting around the house looking at it, I used to like to carry it in my boot sort of like a last ditch weapon.

Q. A last ditch weapon?

A. I think the police officers know what I'm [1770] talking about.

You know, they usually have several arms and they have what they call a back-up.

Q. You kind of felt the derringer was your back-up?

A. That's right.

Q. And as much as you liked your derringer, as much as you liked your back-up, you were willing to give your back-up up for the love of a lady?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, did you tell us that you would have given the gun to Bev?

A. Well, she was being pretty persuasive, she was making me change my mind.

Q. Now, Don said something to you and I think you said yesterday that you liked your guns and you had a bunch of them.

Did you like your guns better than Bev Murphy, is that what you said?

A. I said that.

Q. Would you give Bev Murphy all of your guns?

A. Nope.

Q. Why wouldn't you give Bev Murphy all of your guns?

[1771] MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. Well, what she had to offer me wasn't worth all of my guns.

Q. But at least the derringer, you would have given the gun to Bev Murphy?

A. Well, she almost had it.

Q. Now, Don said to you you took money from your mother, you took money from the State of Ohio, and you took money from a prostitute, namely, Bev Murphy; do you remember that question?

A. I remember what he was saying about that.

Q. Now, there was a time in your life when Mom and Dad gave you some money, wasn't there?

A. They provided for us, but –

Q. What was that?

A. Well, they provided for us. We didn't get an allowance or anything like that.

Q. If you got money – when did your parents

provide for you?

A. Well, they gave us food, clothing, shelter. They bought us things to entertain us with. It was a good environment.

Q. Say back in September of '82, Mom wasn't sending you money, you weren't pimping for Bev Murphy [1772] and you weren't getting Welfare money all at the same time, were you?

A. No, I wasn't.

Q. I don't remember where the word "pimp" came from, but the connotation was there?

A. Yes.

Q. Were you pimping for Bev Murphy?

A. No.

Q. When you go out, did you ever buy her dinner?

A. Sure.

Q. Did she ever buy you dinner?

A. Sure.

Q. You said that you thought she was a hooker, is that true?

A. Yeah, she did that.

Q. Did she do it in connection with anything that you did?

You didn't drive a big Cadillac and take her down to the corner, did you?

A. No, sir. I drove an old beat up Chevy.

Q. You didn't let her bring people into your house, did you?

A. No, sir.

Q. How much money would Bev Murphy give you?

A. 20, 30, 50 dollars.

[1773] Q. How often did Bev Murphy give you money?

A. Not often.

Q. How often did you give Bev Murphy money?

A. Not often. Just if the need arose, she knew I was having a rough time, so she would help me out. If she expressed she needed help, then I would help her out.

Q. Well, Frank, if we had a column over here and we would say Bev Murphy v. Frank Spisak, how would the columns add up; did you give her more than she gave you or was it the other way around, or would it be about even?

A. You mean materially or everything altogether considered?

Q. Well, let's talk money, first.

A. Well, in the money column, she probably gave me more money than I gave her.

Q. Did you consider yourself her pimp?

A. No, not really.

Q. Did she ever say you were her pimp?

A. No, not seriously.

Q. Do you know where we can find her?

A. No, I don't.

Q. You don't know where she lives now?

[1774] A. I don't know.

Q. Now, Don said to you, you remember the early morning when you killed Brian Warford and you parked your car across the campus and you walked across the dark and quiet campus and you came upon Brian Warford in the bus shelter, that's what you told us?

A. Sure.

Q. And then you killed him, didn't you?

A. Absolutely.

Q. How many times did you fire your Erma .22 semi-automatic pistol?

A. I believe four.

Q. Four?

A. Yes.

Q. There was some discussion about it this morning.

Do you know how many times you hit Brian Warford?

A. I thought I hit him all four times.

Q. You thought you hit him all four times?

A. Yes.

Q. How did you feel when the gun was going off?

MR. NUGENT: Objection.

THE COURT: Overruled.

[1775] A. I don't remember.

Q. Don Nugent said you scampered away like a frightened rabbit, did you run away from that?

A. I don't remember.

Q. You don't remember what you did?

A. I don't remember.

Q. How did you feel after you killed Brian Warford?

A. Pretty good.

Q. Did you do something to celebrate?

A. Oh, I went home and I went to sleep.

Q. Then after the discussion about not paying, not supporting your wife and child, and getting a haircut, or getting your hair cut to fool us and those sorts of things, we had some talk about illegally using a sick day.

MR. NUGENT: Objection, Judge. I never said that.

THE COURT: Sustained.

Q. Did you and Don Nugent have a conversation this morning about taking the day off on February the 1st, 1982?

A. Yes, we did.

Q. You had a hangover you said, Alice Davis had been at your house, is that right?

[1776] A. She was living with me at the time.

Q. She was living with you?

A. Yes.

Q. And who else was living with you?

A. She was living with me, and her son, too.

Q. You said she drank a little bit and when she was there, you drank a little bit?

A. More than I usually do, yes.

Q. You didn't point a finger at Alice Davis and

say Alice Davis made you do it; did you? You said you had too much to drink?

A. Sure.

Q. Did you cheat somebody when you took the day off?

A. No.

Q. Were you entitled by the Union contract to have that day off?

A. Whenever and howsoever I wish it.

Q. So you didn't do anything wrong or illegal in taking the day off?

A. No.

Q. You had some discussion about the book that you told us about which was entitled Germany Today, I think you said it was written in 1963, do you remember your discussions?

[1777] A. Sure.

Q. Now, how long did you read that book on the morning of the 1st of February, the day you killed Reverend Rickerson?

How much time did you spend reading that book that morning?

A. Maybe two hours.

Q. You heard Don Nugent question you this morning about it, didn't you?

A. Sure.

Q. Questions about whether in fact there was such a book?

A. I am absolutely sure there was a book.

Q. And you told us it was a reprint, right?

A. Yes, it was.

Q. Do you remember if it was a hard cover, paperback or pamphlet or what it was?

A. It was a hardback book. It was green and inside on one of the pages, the first few pages had a picture of Adolf Hitler that looked like it had been torn and somebody had taped it.

Actually it wasn't torn or taped, but that's how it appeared to be. Do you know what I'm saying?

Q. Maybe creased or something like that, but [1778] it was taped?

A. Yes.

Q. You spent about two hours reading that book?

A. Sure.

Q. Would you challenge anybody that might come in here and say no such book was in the library, would you challenge anyone and say that it was?

A. It was there, but it probably isn't there anymore.

Q. If you know about how many books, if you know, how many books are there at Cleveland State University library?

A. Lots of them. There are lots and lots of them. There's four floors and there's millions of books in there.

Q. What department of what part of the library did you find that book that you read? Germany Today?

A. I think it was on the first floor

Q. You spent about two hours reading it?

A. Yes.

Q. What did you read about?

A. I read about all different articles that were in that book. I can't remember every single article in the book. The book itself just sticks out well in my mind.

[1779] Q. Now, Don Nugent said to you this morning when you went into the bathroom at Cleveland State University you picked out the second stall, right?

A. Sure.

Q. Anybody particular reason why you did that?

A. Well, because the last one was occupied.

Q. So you went to the next one?

A. Sure.

Q. You talked this morning about the two guns, well, the sister guns, the two Ermas, one was very much like the other?

A. They were identical.

Q. They were identical, twin guns, and you cut one of them in half?

A. I destroyed it.

Q. What did you cut it with?

A. Saw.

Q. You felt sorry that you cut it afterwards?

A. Yeah, I couldn't put it back together again, once I cut it up.

Q. And you still feel sorry, don't you?

A. Sure.

Q. Why do you feel sorry?

A. I miss it.

Q. Do miss your other guns?

[1780] A. Sure.

Q. Would you like to have your other guns back?

A. Yeah.

Q. If you got your other guns back, what would you do with them?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. What would you do with your other guns?

A. What would I do with them?

Q. Yeah.

A. I would use them to escape from jail.

Q. And would you keep your guns after you escaped from jail?

A. I wouldn't let nobody take them away from me anymore.

Q. What would you like to do with your guns if you weren't in jail and you had your guns?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. I would go out and continue the war I started.

Q. Tell us about the war that you would continue, what would you continue doing?

[1781] A. I would continue to inflict the maximum amount of damage on the enemies as I am able to do.

Q. And the enemies, Frank, is who?

A. Blacks and Jews.

Q. All right. You told us – you told Don Nugent this morning, didn't you, there was nothing wrong with your conduct?

A. What did he make that statement in reference to?

Q. Do you remember talking about killing Reverend Rickerson and trying to kill John Hardaway?

A. Sure.

Q. And shooting Coletta Dartt and killing Mr. Sheehan?

A. Sure.

Q. And killing Brian Warford.

A. Sure.

Q. You said there was nothing wrong with your conduct?

A. Right.

Q. And you think there is nothing wrong with your conduct now?

A. No.

Q. If you got out of jail and these nice people gave you your guns back and you could continue killing black people and Jews, do you think there would be nothing wrong with that conduct?

A. God didn't find anything wrong with Finias.

Q. With who?

[1782] A. With Finias.

Q. Finias?

A. Yes.

Q. Tell the jury, if you, will, who Finias was.

MR. NUGENT: Objection.

THE COURT: Overruled.

Q. Who was Finias?

A. Finias is mentioned in the Bible. He was the grandson of Aaron.

Q. What did Finias do?

A. Finias took a spear and ran it through the back of a man and into the belly of a woman that were together in a tent and he found favor in the eyes of God for doing that.

Q. And that man that he speared with the spear, was that man – who was that man?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. He was one of the Israelites.

Q. And the woman who was speared by the same spear, who was she?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

A. She was from another race.

Q. And what race was that?

[1783] A. Black, probably.

And my interpretation of the Bible she was not of the white race of people.

Q. And you believe what you read in the Bible,

don't you?

A. Absolutely.

Q. And you live by the Bible, don't you?

A. Absolutely.

Q. And there is nothing wrong with your conduct, is there?

A. No, sir.

Q. Do you see yourself kind of like a modern day Finius?

A. Absolutely.

Q. Why did Finius do what he did?

Does the Bible tell you that?

A. Yes, it does.

Q. What does the Bible tell you about that?

A. The Bible tells us at that time the Israelites were encamped and there were a lot of foreign people around there and the men started going out with them and taking them to wild parties and dances and everything, and they were becoming corrupt and perverted and subverted and falling into sexual immorality and God was very angry, he was going to send a plague and wipe out all of them just like he did [1784] Sodom and Gemmorah, but then he decided instead he would just thrust a spear through these two people because of the one act, so God didn't send the plague. He said for this I'm going to spare the people and Finius and his people would be high priests forever and ever.

Q. Finius speared a man, Israelite who was with a black woman, right?

MR. NUGENT: Objection.

A. Well, that's in the Bible, it's in Numbers Chapter 25. The whole chapter is the story of Finius.

Q Beverly Murphy is black, isn't she?

A. She is.

Q. And you believe in what you read in the Bible, don't you?

A. Sure.

Q. And you had been to bed with Beverly Murphy, haven't you?

A. Yeah.

Q. And for Beverly Murphy's love you would have given up your Derringer, isn't that right?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. Is that right?

A. I was thinking about it.

Q. You were just thinking about it?

[1785] A. Yeah.

Q. But you had been in bed with Beverly Murphy, haven't you?

A. Yes.

Q. And you for fornicated with Beverly Murphy?

A. Yeah.

Q. How does that square with the story of Finius in the Bible?

A. I suppose what I was doing was wrong.

Q. And the punishment in the Bible was death, does that matter to you, Frank?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. The war that you told us about that you would continue, you are a prisoner of war now, aren't you?

MR. NUGENT: Objection.

THE COURT: Overruled.

A. Yes, I am.

Q. Do you suppose for fornicating with Beverly Murphy was wrong, then?

A. I suppose so.

Q. Now, you said something to Don Nugent when he talked about – he said you were in a rat cellar, do you remember the rat cellar Don Nugent was talking about in the basement of Reddish's home?

[1786] A. Yes. It was pretty dark and dirty in there.

Q. It was dark and dirty, that's probably why Don Nugent called it a rat cellar.

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. He said you were crenched down there in the rat cellar and you were, weren't you?

MR. NUGENT: Objection.

A. I was.

THE COURT: Overruled.

A. I was trying to hide there, and there's no doubt about it.

Q. Why were you trying to hide?

A. Well, I didn't want them to catch me right

then that day.

Q. Why didn't you want them to catch you right then that day?

A. Because I wasn't prepared.

I wanted to continue with my war and keep inflicting the maximum amount of damage as I could.

Q. You wanted to keep killing and if you were caught, you couldn't keep killing?

A. Sure. I figured it would be better to get as many as I could.

Q. And it was during that exchange that you told Don [1787] Nugent you were going to lose your life anyway, wasn't it?

A. Well, that's what they are trying to do to me here.

They are trying to try me and execute me like they did in Nurenburg when they hung –

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Do you remember Don Nugent asking you something about the Pope in 1935 and --

MR. NUGENT: Objection. Get it right. I said '33.

THE COURT: Wait a minute. Wait a minute. Come up.

(Thereupon discussion was had between Court and counsel off the record and out of the hearing of the jury.)

[1788] THE COURT: Okay.

Mr. Shaughnessy, you may resume with your couple of questions.

MR. SHAUGHNESSY: Thank you so much.

BY MR. SHAUGHNESSY:

Q. Well, in any event, Frank, you and Nugent talked about Hitler and the bunker where he was reputed to have taken his own life.

You recall that conversation?

A. Sure.

Q. All right.

Did Hitler take his own life, if you know?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled. I don't know what it has to do with this anyway.

But go ahead. Do you know whether he took his own life?

A. No.

THE WITNESS: That's what I read.

Q. All right.

But you talked to Don about that yesterday at some length, didn't you?

MR. NUGENT: Objection.

[1789] THE COURT: You know what was discussed at sidebar –

MR. SHAUGHNESSY: All right.

Q. You talked to Mr. Nugent about that yesterday?

MR. NUGENT: Objection.

THE COURT: Come on up.

MR. SHAUGHNESSY: I will withdraw it, Judge.

THE COURT: Okay. Go ahead.

Q. Frank, the letter that you wrote to – what is the person's name?

A. Rick.

Q. Rick.

And his last name is?

A. Esto.

Q. Esto, E-s-t-o? Is that right?

A. Yes.

Q. And –

- - - - -

(Thereupon, Defendant's Exhibit C was marked for identification.)

- - - - -

Q. Frank, I'm going to give you what our court reporter has marked as Exhibit C.

And I want you to take a minute and look over [1790] Exhibit C, kind of get a sense of what it is and look it over and tell us then, if you can, what it is and if it is a letter, tell us it is a letter, tell us if it is your letter.

A. Um, this looks like several letters in here. Yes, I wrote these from my cell in the County Jail.

Q. All right.

And tell the jury, if you will, Frank, when did you write these letters, or this letter, whichever the

case may be?

A. April 11, 1983.

Q. All right.

Now, that's just a couple months ago, and this letter is written to fellow, Rick, right?

A. Sure.

Q. And the last name again?

A. Esto, E-s-t-o.

Q. All right.

And you had, apparently, gotten a letter from him because you say here it was great to get a reply from him, right?

A. Well, the last time I saw Rick, when he rode out, he said he wanted me to keep writing to him. I did for awhile. Then his letters kept coming back to me marked contraband.

[1791] Q. Contraband.

A. Yes.

MR. NUGENT: Objection.

THE COURT: Overruled.

THE WITNESS: The letter I was writing to Rick –

THE COURT: Go ahead.

THE WITNESS: The people where he was incarcerated were opening his mail and reading my letters and they considered them contraband. They kept sending them back.

MR. NUGENT: Judge, Objection.

Q. All right.

In any event, Mr. Nugent read the letter this morning, didn't he?

A. Sure.

Q. And he did a pretty good job of reading it, didn't he?

A. Real good job I thought.

Q. A real good job.

And you were kind of pleased with that reading, weren't you?

A. (Witness nods.)

Q. I mean that he was accurate and that he said every word right?

[1792] A. Oh, yes. He didn't misquote me, or anything. He got it all perfectly accurate.

Q. And you kind of said what you meant when you wrote that letter?

A. Sure. I put it all down in black and white, real logical and everything, Bible quotes, the whole bit.

Q. You weren't just mad and fired it off then, that's the real you, the real Frank Spisak there, right?

A. Well, that's as close as you are going to get.

Q. All right.

And again you say in here, "Today I was playing Spades with my white partners against two niggers."

Does it say that there?

A. Yes, that's what it says.

Q. And that's the real Frank Spisak, isn't it?

I mean Don Nugent didn't just say that; it's in there, isn't it?

A. Sure, that's the way I wrote it.

Q. That's the way you wrote it. That's the way you meant it and you didn't just write it because you were mad, because you got your teeth knocked out, [1793] that's the real you, isn't it?

A. Sure. A lot of people use it, even the niggers use it.

Q. All right. And when you used that word, are you intending to demean a particular group of people?

MR. NUGENT: Objection, Judge.

MR. SHAUGHNESSY: Withdraw the question.

Q. Why do you use the word?

A. Well, the word has a certain connotation.

Q. What is the certain connotation you are connotating?

A. In this case we are talking about somebody who is inferior.

Q. All right.

And who you are talking about, black people, right?

A. Sure. If you continue to read the letter here, and see what their conduct was, it shows why I had the attitude about them when I wrote that.

Q. All right.

And it says here, "It was not our lucky day. After we lost the game, the Spooks" – there is a

[1794] "s" on there?

A. There is an "s" on there, but you can hardly see it.

Q. You can barely see it, but when you wrote the letter, you put an "s" on there, and you said the Spooks?

A. Sure.

Q. Now, you are referring back to the people you had earlier called the niggers, right?

A. Sure.

Q. You meant that, didn't you?

A. Yes. Well, I put that in there to be kind of funny, you know.

Q. All right.

A. I wanted to give the letter a little local humor, you know, the guy's in a penal institution, and I suppose there is not much happening down there, so I wanted to write it in such a way that it would be interesting.

Q. You kind of wanted to make his day then? Is that what you kind of wanted to do?

A. Sure.

Q. All right.

"After we lost the game the Spooks told us to hightail it and make way for" – what's this word?

[1795] A. Two.

Q. -- "two of their nigger pals."

You used the word twice in the same paragraph?

A. Sure.

Q. All right.

And you went on to say how you got – you got beat up then, right?

A. Sure.

The guy – I wasn't using this language to the people that were playing the cards. This was after the guy punched me in the mouth, I wrote the letter describing what happened.

Q. All right.

Why do you suppose the guy punched you in the mouth?

A. Well, it says here in the letter.

Q. What does it say in the letter?

Read it from the letter, maybe it will explain it.

A. "I got up to leave and son-of-a-bitches had the nerve to demand my cards to play their game with."

Q. All right.

A. "I said now wait a dad-gummed minute. That's going too far.

[1796] "Well, you should have heard them. Those monkeys" –

Q. Now, the word monkey, do you find it? What does that word mean in the connotation that you use it? Are you talking about the black people?

A. Oh, sure.

Q. The people you call Spooks and niggers?

A. All right. I called them monkeys.

Q. Does it come to you a big shock that somebody gets up and takes a punch at you?

A. I didn't call him a monkey.

Q. Oh.

A. He called me a racist, a no good white motherfucker, that's what the letter says.

Q. Frank, just for the edification of those of us who may not have drawn the conclusion, he called you a racist, no good motherfucker, right?

A. Sure.

Q. All right.

A. That's what it says there.

Q. Does it shock you, or come as somewhat of a surprise that people that you would call niggers, monkeys –

MR. NUGENT: Judge, there is no evidence that he said that to those men that [1797] beat him up.

THE COURT: The objection is sustained.

MR. SHAUGHNESSY: All right.

Q. But in any event, you didn't do anything wrong that day, did you?

A. No.

Q. Your conduct was okay then?

A. Sure.

I was halfway on my way to the room with the cards when he ran after me.

Q. All right.

And anything that happened then was the

black person's fault, not your fault?

A. Well, I didn't punch him first.

Q. All right.

And it says here, "I don't give in easy to threats and blackmail, but neither do I" – what is neither do I like –

A. Like.

Q. "—trouble and violence. I am basically a non-violent person."

A. Sure.

Q. "—and abhor fighting."

A. Sure. They are trying to threaten me by calling [1798] me those names and trying to get me to give them the deck of cards.

Q. All right.

A. And when he ran over, he intended to either get the cards or punch me in the mouth, one of the two. And I didn't give him the cards, so he punched me in the mouth.

Q. And did you say anything to him when he hit you in the mouth?

A. I didn't have a chance, to tell you the truth.

Q. You didn't have a chance, but you were probably thinking some things, weren't you?

A. I thought the guy was out of his mind.

Q. Now, let's hear talk about it, it says here, that you kind of don't like violence and you are basically a non-violent person and you abhor violence. You don't like fighting at all?

A. Sure.

Q. Now, Mr. Nugent may have asked you, I don't remember, but now when Mr. – Reverend Rickerson was killed, when you killed him, was that a violent act?

Maybe you would be kind enough to explain that to the jurors.

A. It was an act of war.

[1799] Q. Act of war, but was it a violent act?

Now, you kind of said there was nothing wrong with your conduct and you told us that you killed Reverend Rickerson, that you killed Mr. Sheehan, that you killed Brian Warford, that you are basically, the real you, is kind of a non-violent person who abhors fighting. All right?

A. Sure.

Q. And there is no contradiction here, is there? You do abhor fighting, don't you?

A. Sure. I don't go around trying to provoke fights.

Q. All right.

And you don't go around trying to provoke violence, do you?

A. No.

Q. But now when you killed Reverend Rickerson, was that a violent act, or why did you do that, if you abhor violence?

MR. NUGENT: Objection, Judge.

Q. I mean can you kind of explain that to the jurors?

A. I feel I was doing God's work at that time.

Q. All right.

And anyway, the letter goes on to say something, [1800] "and bloodshed." I guess that's the end of this sentence.

"I abhor fighting and bloodshed."

Now, when Reverend Rickerson went down on that cold tile floor, there was a lot of real blood there, wasn't there, Frank?

A. Sure.

Q. And when Mr. Sheehan went down, doubled down on the floor, there was a lot of real blood there, wasn't there?

A. Sure.

Q. Kind of like you to square that with the jury, that you abhor fighting and bloodshed with what you told us about how you felt about killing Reverend Rickerson and the other people?

Can you tell us anything about that?

A. It was necessary. I had to do it, that was my duty. I had no choice.

Q. All right.

And who gave you this duty?

[1801] MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

THE WITNESS: It was my conscience.

Q. All right.

Anyway, the letter, Mr. Nugent did go on to read it, "The really amazing thing is I'm thinking of Jesus at the time and it doesn't even occur to me to hit him back."

All right. "I just stand there holding pieces of my teeth in my hand and spitting blood and praying somebody will come and stop him before he kills me, or hits me again."

This letter goes on to explain about that, doesn't it?

A. Sure.

Q. And it says over here, "I hate the black bastards."

It says that, doesn't it?

A. That's what it says.

Q. Kind of hard to read there. Can you read that paragraph for us?

A. The whole thing?

Q. Yes.

A. Okay.

[1802] "They are loud-mouthed, arrogant, ignorant, and not worthy to be considered human beings. They are lower than animals, because even animals will not attack people without reason. This guy had no good reason to hit me except I am white. Ninety percent of their people have no good reason for anything they do. The ape who punched me" –

THE COURT: Put a question.

MR. SHAUGHNESSY: Could we come to the sidebar?

THE COURT: Sure. Bring the machine.

(Thereupon, a sidebar discussion was had between Court and counsel out of the hearing of the jury on the record as follows:)

THE COURT: Put it on the record.

MR. SHAUGHNESSY: Your Honor, I certainly agree with the Court wholeheartedly.

THE COURT: Lookit. You can put a question – I'm very impressed that he can read the letter. It was gone over once. If you want to question him about the letter, [1803] it's perfectly all right; but I'm not going to have you read that stuff with an audience here.

MR. SHAUGHNESSY: Okay.

THE COURT: Okay.

(Thereupon, the following proceedings were had in open court:)

BY MR. SHAUGHNESSY:

Q. Anyway, Frank, that's your letter, that's the exact copy of your letter.

All right. And that expresses your feelings, doesn't it?

A. Sure.

Q. All right.

A. Pretty completely, I think.

Q. Sure.

And you told Don Nugent this morning that there was nothing wrong with your conduct, didn't you?

A. Sure.

MR. SHAUGHNESSY: All right. Your Honor, we have no further questions.

THE COURT: We are going to take a short recess at this time.

I will try to keep it short. Well, just getting everybody in and out of the room [1804] sometimes is difficult. We are going to attempt to finish with the testimony of Mr. Spisak. We may be a little late.

Mr. Nugent, do you have any idea how long you will be?

MR. NUGENT: Fifteen minutes, Judge.

THE COURT: All right. Remember the admonitions.

(Thereupon, a recess was had.)

[1805] (Recess had.)

THE COURT: You may be seated.

Mr. Nugent, you may continue.

RECROSS-EXAMINATION OF FRANK SPISAK

BY MR. NUGENT:

Q. Mr. Spisak, can I see the photograph you showed Mr. Shaughnessy?

A. Sure. Sure, there it is, sir.

Q. You don't have your moustache in this photograph either, do you?

A. Well, I'm considerably younger there, and the hair wouldn't grow in like it does now.

Q. Is that the same apartment that you were arrested in on East 53rd Street?

A. Of course.

Q. And there are, of course, a number of tapes and other items that didn't pertain to Nazi memorabilia, correct?

A. Sir, I think I can direct your attention to the

lower left-hand corner of the photograph. You see the top of the box of the game, that's the game of Snaligrand, [1806] a game of World War I when Hitler –

Q. There were other things, tapes, record player, you were holding a Mouseketeer banner?

A. Mickey Mouse.

Q. It says Mouseketeer, right?

A. Right.

Q. And you didn't have a moustache then?

A. Well, that's because I was considerably younger.

Q. Yes or no.

A. Sure.

Q. And you shaved your wide moustache, I would say, the morning of trial, or the day before trial, correct, before this case started, like this?

A. Whatever, sir.

Q. Well, either you did or you didn't.

A. I don't really remember what day it was.

Q. It was within two or three days before the trial began?

A. Two or three weeks.

Q. Okay.

Now, you also made a comment, the letter you were making, you certainly didn't call the gentleman who punched you, or the gentleman you played cards with, you didn't call those racial threats to his face, did you?

A. No, sir. I didn't do anything to provoke the fight.

[1807] Q. No. No, I'm just saying, you didn't say those things to him?

A. I didn't say a word to him.

Q. What happened after he punched you and you had blood in your mouth? You got angry and wrote to your friend and that's when you made all these slurs and accusations because you were angry about what had happened to you?

A. Yes, sir.

Q. And you signed your letter, Love Frank?

A. That's how I usually sign a letter.

Q. You said to Mr. Shaughnessy you were only a homosexual for one year?

A. Sure.

Q. Now, you also said to Mr. Shaughnessy, and he asked you a series of questions about Detective Beavers and about Detective Ferris, and whether they had a tape recorder and all those items, so we would know exactly what you said to the police?

A. Sure.

Q. The fact of the matter is, that the detectives gave you an opportunity to write down whatever you wanted the people to see written down, correct?

A. Indeed.

Q. So you had that opportunity, so it was your choice [1808] what would be recorded on a piece of paper or recorded for prosterity, that was your choice to make, wasn't it?

A. Yes, sir, it was.

Q. All right.

So no matter what you would have said to the police beforehand, you had the opportunity to say everything about all the homicides, about your alleged war, about everything you talked about, you had that opportunity and you chose not to put it down on paper?

A. I had a very good reason.

Q. You didn't do it though, correct?

A. I did not.

Q. You had very good reason and the reason was so you could listen to what everybody said and then form your answer when you testified the way you wanted to say it?

A. No, sir, that's not the case at all.

Q. You told –

A. I didn't do it because there was a chance that if I were to put it all down in writing at the time they might suppress it and the truth might never get out. I knew in an open court of law before the TV cameras and the whole world, there is no way in the world of putting my whole story in, put it all down on a transcript, that's the way I wanted it.

[1809] Q. You told Dr. Resnick when he interviewed you, you were a homosexual since 1976; isn't that true?

A. That's incorrect.

Q. And that you went from the men's room at the Cleveland State University from 1976 on to when you were arrested and performed homosexual acts in the restroom?

A. That's not correct, if it's in the report, it is not

correct.

Q. Did you say this to Dr. Resnick, "The defendant reports that he frequented men's rooms at Cleveland State University for purposes of soliciting homosexual relationships since 1976. He reports being involved in both oral and anal sexual activities there. He viewed Cleveland State University as 'like home to me,' even though he was not enrolled there."

A. Those are Resnick's words, not mine.

Q. Did you say that to him?

A. No, sir.

Q. Now, you talked to Dr. Resnick also about Timothy Sheehan, did you not?

A. I suppose I did.

Q. And you also talked to Dr. Resnick about the Reverend Rickerson?

A. Yes, sure.

Q. And if I'm misquoting, please correct me, if I'm wrong.

[1810] You said in a response to a question to Mr. Shaughnessy, "I tried to be truthful this morning on cross-examination to everything."

A. Indeed.

Q. Didn't you tell Dr. Resnick in reference to Reverend Rickerson that you were there at the Cleveland State University in the restroom, that you entered the men's room and began to masterbate in front of the mirror and if others came in, you sometimes ran to hide in a stall?

"He reports that he is unsure about whether he smoked marijuana that particular day. He states

that Tim Sheehan, a well-dressed white man who looked like a professor, came in to the men's room. He had not seen Mr. Sheehan before. He reports that Mr. Sheehan touched his penis, but declined when the defendant offered to 'blow him.'"

Did you say that to Dr. Resnick?

A. That's his words, not mine.

Q. Did you say that to Dr. Resnick?

A. I don't believe I did.

Q. Did you tell Dr. REsnick that you were masterbating in the restroom in front of the mirror at Cleveland State in March, 1982?

A. I don't remember telling him that.

[1811] Q. You don't remember that?

A. No, sir.

Q. Do you remember saying Mr. Sheehan came in and you offered to blow him and Mr. Sheehan rejected that offer?

A. No, sir.

Q. You don't remember saying that?

A. No, I don't remember seeing Timothy Sheehan, period.

Q. You aren't denying that you said that to Dr. Resnick, are you?

A. I'm denying it.

Q. Did you say this to Dr. Resnick, "Mr. Spisak states he left the men's room because he was unsure if Mr. Sheehan might call the police, and spent 45 to 60 minutes in the library nearby."

Did you tell that to Dr. Resnick?

A. Those are his words, not mine.

Q. My question was, did you tell that to him?

A. No, sir.

Q. Did you tell him this, "He returned to the men's room and noticed that someone was in 'his' end stall. He states that he entered the stall next to that one. There was a large hole, (18 to 24 inches in diameter) between the two stalls. He saw Reverend Rickerson sitting on the toilet masterbating. He reports that he did not like [1812] him because he was black. (He did have occasional homosexual and heterosexual relationships with blacks, but preferred white male partners.)"

Did you say that to Dr. Resnick?

A. Absolutely not. Where in the heck is he coming up with these ideas?

Q. You didn't think he would write them down?

A. How did he figure I prefer –

Q. My question was, did you figure he would write it down?

A. I don't know where in the world he got those kinds of ideas. It sounds to me like a lot far-fetched crazy stuff.

[1813] Q. Did you say this to Dr. Resnick, "He reports that Reverend Rickerson reached through the hole and touched the defendant's exposed leg. He states that he just wanted to get out of there because he felt repulsed by this approach. Mr. Spisak hoped that the Reverend would leave and 'Let me have my fun'. He stated that he had a pistol with him that day, which he often carried. He states that he was mad at Reverend Rickerson for being in the stall and being 'so obnoxious'. He states that he was

in such a bad mood that day that the slightest thing could have set him off. He had never seen Reverend Rickerson before. After Reverend Rickerson insisted in approaching him two or three times, he states he shot him four times with his automatic .22-caliber pistol. He reports that he did not think he would die. He then ran out quickly because he was scared. He states that he would not have shot him if others had been in the bathroom for fear of being caught."

Did you say that to Dr. Resnick?

A. I think he took what I said and he twisted it around, and like all the psychiatrists nowadays, they like to twist and pervert them and subvert them and put different things in and all kinds of [1814] crazy sexual connotations in there.

I certainly told him no such thing. And I never put no such thing in writing, and you won't see my signature in there on a piece of paper anywhere.

Q. You went over Mrs. Dartt's – at least the doctor's report, you were going to slap the shit out of her and at least rob her?

A. Those are his words, not mine.

Q. With Mr. Sheehan, you told us this morning that you hadn't seen him before and you didn't intend to rob him other than the beeper?

MR. SHAUGHNESSY: Objection.

THE COURT: Overruled.

Q. Do you remember that testimony?

MR. SHAUGHNESSY: May we approach the Bench?

THE COURT: Sure.

(Thereupon, a sidebar discussion was had

between Court and counsel off the record and out of the hearing of the jury.)

Q. You did indicate to us that you were in need of money after your being laid off and when you went to Cleveland State University you were in need of [1815] money. You did say that, didn't you?

A. I had Unemployment Compensation coming in.

Q. And then when Beverly Murphy gave you money, it was during the month of August, and it helped?

A. Sure.

Q. And she gave you money, too, because you needed money?

A. She gave it to me because I was out of a job.

Q. And you needed money?

A. She helped me out. So when she helped me out, I wasn't in need of money anymore.

Q. And you told Dr. Resnick in reference to Mr. Timothy Sheehan, we have already gone over, at least the report, you said to him in reference to Revered Rickerson, did you tell Dr. Resnick then, "Mr. Spisak reports that he was becoming more desperate financially during the moth of August. He was unsuccessful in finding a new job. He obtained small amounts of money from black prostitutes, but was feeling pressed to pay his utilities and landlord."

Did you say that to him?

A. I'm sure he took whatever I said --

Q. Did you say that to him, Mr. Spisak?

A. Those are not my exact words.

[1816] Q. Well, you were being pressed?

A. Those were not my words.

Q. You were being pressed because you had not paid your rent for a couple of months?

A. That's true.

Q. So you were being pressed by a lack of money?

A. It was a problem, sure.

Q. "He felt 'the whole world was coming down on my shoulders.' He recalls that one Friday, August 27, 1982, he put in three job applications. He decided to stop at Cleveland State University in the afternoon to 'check out the scene.' He recalls being fed up with life and ready to 'blow his own brains out'."

Did you tell Dr. Resnick that?

A. I don't remember telling him any such thing.

Q. "He states that he saw Mr. Sheehan in the hall and recalled him from the incident the day that he shot Reverend Rickerson. He reports that Mr. Sheehan followed him into the third floor bathroom at Cleveland State. Mr. Spisak went into the last stall. Mr. Sheehan went to the urinal. The defendant reports that Mr. Sheehan stared at him when he went to the sink to wash his hands. Mr. Sheehan looked well dressed, so that the defendant [1817] believed he might have some money on him."

Did you tell that to Dr. Resnick?

A. No, sir, absolutely not.

Q. "Mr. Spisak reports that he thought about pointing the gun at him and demanding money. He was hungry and had the thought of getting some money so he could go to McDonald's. He thought in

his mind that it was not fair that this man had money and he did not. He knew that if he did take money from him and let him live, the victim might identify him in the future."

Is that what you said to Dr. Resnick?

A. Absolutely not.

Q. "Mr. Spisak states that after he finished drying his hands, he took out his gun and shot him fast, aiming between his eyes. He reports that Mr. Sheehan 'went right down without a sound.' Mr. Spisak fired four shots. 'Once I got started, I couldn't stop. It made me feel good. The more I shot, the more I got addicted to it. I felt great.'"

Did you say that to him?

A. I think he has taken what I said and twisted it around and put it --

Q. "He stayed around a minute to pick up his [1818] shell casings and a beeper that fell out of the victim's shirt pocket. He thought it looked neat and he knew the victim would have no more use for it. At home, when he found it did not play music and didn't say anything, he lost interest in it. He states that he looked in his wallet, but found no cash, so he took only the change available in his pocket."

Did you do that to Timothy Sheehan, looked in his wallet and found no money in it?

A. No, sir.

Q. Did you tell Dr. Resnick these things?

A. Whatever I told him, like I said, he twisted it and he turned it around.

Q. "He recalls" –

A. I'm sure he had an ulterior motive.

Q. "He recalls getting out real quick because he did not want to get caught. His mood was that of being mad at the whole world. He was 'ready to kill anyone'. He replied that he did not suffer from hallucinations on that occasion."

Did you tell that to Dr. Resnick?

[1819] A. I don't know how he arrived at those conclusions. It sounds like a bunch of crazy stuff to me.

[1820] Q. Did you tell Dr. Resnick that you and your pal Reddish were driving around and you saw two young black men with a big radio and you were going to shoot them but the two ran away?

A. I don't remember that.

Q. That was the night before, wasn't it?

Didn't you get together with Reddish on Saturday night and then you went out hunting and you didn't find anything?

A. Sure, we went out.

MR. SHAUGHNESSY: Excuse me. Will you note my continuing objection?

THE COURT: Do you have an objection?

MR. SHAUGHNESSY: I have an objection.

THE COURT: Okay. Overruled.

Q. You went out on Saturday night hunting, didn't you, with Ronald Reddish?

A. No, I don't think so.

Q. Did you go out the day before the shooting of Brian Warford hunting with Ronald Reddish?

A. What day was that?

Q. Did you tell Dr. Resnick:

"Mr. Spisak stated that after the Friday [1821] shooting, meaning Mr. Sheehan, Ron Reddish called and said that he was famous. Ron Reddish came over Saturday evening and the two decided to go out and do some shooting. They were looking for black people to shoot. They drove around 93rd and Union. Ron Reddish was carrying one gun, and the defendant was carrying two guns and 50 rounds of ammunition. Mr. Spisak reports seeing two young black men with a big radio, but they ran away before the defendant had a chance to shoot them."

Now, did you tell Dr. Resnick that?

A. I don't remember that.

Q. That did happen, didn't it?

A. Sure.

Q. So you saw some black males on Saturday night when you were out hunting and you didn't shoot them for one reason or another?

A. Well, they were too far away. I couldn't catch them.

Q. Did you tell Dr. Resnick that:

"On Sunday me and Reddish got together again. They spotted a couple of potentials, but something interfered, such as cars being too close. They abandoned the plan rather than risk being caught. Ron was more conservative and discouraged him from [1822] shooting unless the situation was safe."

Did you tell Dr. Resnick that?

Do you remember my question?

A. What was your question?

Q. Did you tell Dr. Resnick that Ron was more conservative and discouraged you from shooting unless the situation was safe?

A. Well, when we were on the one corner he told me not to because there was a police car.

Q. So we can at least agree to that, according to Dr. Resnick's version of what you told him, you told him that you did see Tim Sheehan, you did see Tim Sheehan in the bathroom before you shot Reverend Rickerson, and he left when he rebuffed your homosexual advance, you did see him, and then you saw him again on the 27th when you were in the men's room and you thought he might have some money on him, Mr. Sheehan was well dressed, but you didn't tell him anything about Mr. Sheehan looking like a Jewish professor.

You just told him you thought he had money and you went and looked in his pocket and you took his things?

A. No. I told that psychiatrist a lot of things and I'm sure a lot of things I said aren't in the [1823] report. Those are a lot of his words and his conclusions. They were not my words. Everything in that report are just his conclusions and you cannot quote me on saying a lot of that stuff, that's just some of the stuff that guy said.

Q. How about this.

Do you know a young lady by the name of Marrianne Lewandowski who's in the back of the courtroom in the white and green and purple and yellow blouse?

A. Marriane Lewandowski?

Q. Yes.

A. Where?

Q. With the glasses on.

A. No.

Q. You knew from Midpark High School, didn't you?

MR. SHAUGHNESSY: We're going to object.

THE COURT: The objection is sustained.

Q. Well, now, Mr. Shaughnessy asked you a question about a situation where --

THE COURT: Come up here.

- - - - -

[1824] (Thereupon a discussion was had between the Court and counsel off the record and out of the hearing of the jury.)

MR. NUGENT: Marrianne, would you please stand up for a second?

BY MR. NUGENT:

Q. Mr. Frank Spisak, do you recognize that young lady wearing the glasses as Marrianne Lewandowski?

MARRIANNE NEMEROVSKY: Marrianne Nemerovsky. N-e-m-e-r-o-v-s-k-y.

Q. I'm sorry, Marrianne Nemerovsky, do you recognize this lady as the young lady you went to Midpark High School with and graduated from?

MR. SHAUGHNESSY: I object to the lady testifying without being sworn, your Honor.

A. I never seen her before in my life.

THE COURT: Okay. Put another question and go to another subject.

Q. On redirect examination about paying support, you never paid support to your wife, did you?

A. I didn't have to.

Q. That was not my question.

You never paid support to your wife, did you?

[1825] A. There was a time when I did.

Q. You didn't pay support for your child from 1978 through 1981, did you?

They only started taking money out of your check on January 12, 1981?

A. Well, prior to that time we were married and before that I paid directly to my wife.

Q. So you were pounding and shouting that you got divorced in 1980, you told us that?

A. Sure.

Q. And that you didn't make any payments or any records until January 12, 1981, you never paid support to your wife because you didn't have to?

A. There was no need to pay support if we weren't divorced.

Q. Now, you said to Mr. Shaughnessy that – he equated a Bible story about Finias, about a couple that was stabbed with a spear and died.

A. Yes.

Q. You said what you did with Beverly Murphy was wrong?

A. Yes.

Q. Would you agree you can make a decision before you do it, before you do any act on what you want to do and if it's wrong, you're sorry about it [1826] afterwards or if you think the way the Bible thinks, you shouldn't do it and you feel that you're forgiven for it; so you decided what you wanted to do, is that right?

A. Well, is that the rest of the question?

Q. That's it, pal.

THE COURT: Look. Can you answer the question?

THE WITNESS: I don't even understand the question.

THE COURT: Put another question or rephrase the question.

Q. If you believe in the Bible like you purport to believe in it, you're saying you should be killed for having sex with Beverly Murphy?

A. Sure.

Q. You knew that before you had sex with Beverly Murphy, you knew according to the Bible, according to your version the Bible taught that to you, but you decided that and you chose what you wanted to do regardless of the fact that it's a sin?

A. Well, I'm not perfect. I committed a sin.

Q. Now, when the Bible says Thou Shalt Not Kill, you disregard that to suit your purpose, too, don't you?

[1827] MR. SHAUGNESSY: Objection, Judge.

THE COURT: Sustained.

MR. NUGENT: I have nothing further,

Judge.

THE COURT: Do you have any more questions of Mr. Spisak, Mr. Shaughnessy?

MR. SHAUGHNESSY: I can't think of any.

THE COURT: Thank you, Mr. Spisak, for your testimony in this case.

MR. SPISAK: You are welcome.

THE COURT: I'm going to send you home for the weekend.

Remember we have come a long way in this trial so I want you to be especially scrupulous about following the admonitions.

Do not discuss this case among yourselves. Do not permit anyone to discuss it with you or in your presence. Do not form or express any opinion on this case until it is finally submitted to you. You are instructed not to read, view or listen to any report in the newspapers, radio or television on the subject of this trial.

Journal Entry
Dated: July 15, 1983

[scanned]

'ATE OF OHIO, } ss
CUYAHOGA COUNTY }

IN THE COURT OF COMMON PLEAS

.....MAY, 1983.....Term, 19.....

To-wit: JULY 15, 1983, 19.....

No. CR 181411

INDICTMENT AGGRAVATED MURDER W/ Specification w.cts

STATE OF OHIO Plaintiff

vs.

FRANK G. SPISAK JR.

Defendant

RECEIVED FOR FILING
JUL 27 1983

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and Defendant, Frank G. Spisak Jr. was brought into Court with Counsel present.

Now comes the Jury conducted into Court by the Bailiff and returned the following verdict in writing, to-wit: "We, the Jury being duly impaneled and sworn, do find the defendant, Frank G. Spisak Jr., Guilty as to Count One, Aggravated Murder, RC 2903.01 and Guilty of Specifications one, two, three and four, and "We, the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak Jr., Guilty of Count two Attempted Murder, RC 2923.02 RC 2903.02 and "We, the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak Jr. Guilty of Count three, Aggravated Robbery, RC 2911.01 and "We, the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak Jr. Guilty of Count four, Aggravated Robbery, RC 2911.01, and "We, the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak, Jr. Guilty of Count five, Aggravated Murder, RC 2903.01, and Guilty of Specifications one, two, three, four, five and six, and "We, the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak Jr. Guilty of Count six, Aggravated Murder RC 2903.01, and Guilty of Specifications one, two, three, four and five, and "We the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak Jr. Not Guilty of Count seven, Aggravated Robbery, RC 2911.01, and "We, the Jury being duly impaneled and sworn do find the defendant, Frank G. Spisak Jr. Guilty of Count eight, Aggravated Murder, RC 2903.01, and Specifications one, two, three and four; Not Guilty as to Specification five.

Thereupon the Court informed the defendant of the verdict of the Jury.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

[2417]

MR. SHAUGHNESSY: Good morning, ladies and gentlemen. I will take just a minute.

The law provides -- and anything that we have done, everything that we will continue to do will be according to the statute, according to the law. The portion of the trial that we are in, we are going to be talking about mitigating circumstances. They are spelled out. The Court – spelled out in the statute. The Court is going to tell you what they are.

Our contention is, has been and will continue to be, that Frank Spisak is sick, very sick. We think that we will be able to show you that. We are going to bring in two psychiatrists, one psychologist. And there may very well be other witnesses brought in by the State of Ohio.

The very, very narrow question that we are going to be concerned with is how sick, if he is sick, and the mental illness, [2418] the mental defect, if any, that Frank Spisak may have. And I will say this, and then sit down and let Don Nugent tell you those things that he feels about this; but if Frank Spisak was sitting here and had cancer, if he had a broken arm, or something like that, it would be really — I could run him under the x-ray machine, the x-ray machine would come back, and here you have got an objective finding. He has got this, this, this and whatever the diseases are.

And you are going to hear this from the psychologist. They are very good doctors, but I think I got a little flavor of this the other day, the science of psychiatry is not objective. It is not an exact science.

Two real good doctors, two brilliant doctors, can disagree, and they often do. You are going to hear from three. You may hear from more. In any event, we think that when you have heard all of the evidence, that – and this is what you will get to weight. Dr. Bertschinger is going to explain that. You will have on one side the aggravating factors. [2419] And let's be frank about it, it's considerable aggravating factors, no question about that. On the other hand, the mitigating circumstances, which we will try to show you today, or Monday, or however long it takes.

At the appropriate time, we will get to address you again. And we will get to argue, and, honestly, we have a point of view, and we had that point of view. We didn't make that point as, maybe, obliquely suggested. Our point of view wasn't developed after we all got together some five or six weeks ago.

Our point of view – the first day we walked in and saw Frank Spisak, this was our point of view. It is still our point of view. We are sincerely bringing those doctors on to support our point of view. At the appropriate time you will weigh it. If you agree with us, fine. If you don't agree with us, you are the jurors.

Thank you very much.

OPENING STATEMENT ON BEHALF OF THE STATE OF OHIO

[2420]

MR. NUGENT: Good morning, again, ladies and gentlemen.

Now, I know this is new and it is different and something that you are not completely aware of, what is about to happen, but as you can see there is a difference in what has happened today, and what happened with the guilt phase of this trial, and that is the defense went forward today first, because they have a burden. The law says they are to go forward, meaning first, with the evidence in mitigation. So what the law allows them to do is to put before you something or some factor, whatever they think may be mitigation, may be a reason you should not recommend to Judge Sweeney that the sentence of death be imposed.

Now, they can put whatever they want on. It doesn't make any difference what it is. They can put on – I don't know exactly what they are gong to put on, but you will listen to it, I'm sure, like you did the other evidence.

It is not necessary that the [2421] prosecution put anything on at all, because you see, you have already found the defendant guilty by evidence beyond a reasonable doubt on at least 15 or more aggravated circumstances. So one aggravated circumstance is sufficient for you to recommend the sentence of death to this Judge; but you have found, like we say, you know how many there are, you did it all yesterday. Each specification is an aggravating circumstance of which the sentence of death may be imposed.

Now, the real task for you to do is this, initially, you must determine is there any mitigation, that is, the defendant offered, if they put on a psychiatrist and psychologist. You may listen to the testimony. You may say to yourselves, well, don't think that's mitigation. I don't think that comes within the statute. He may have a personality disorder. I think we can all agree that one who goes out and shoots and kills somebody has a personality disorder because that's not something you or I would do, that's different than the norm.

Everything that is a violation of [2422] law is different from the norm, because the law aspires to a certain conduct for everyone to go by. And if you go away from that conduct, you are abnormal, or going different from the norm. And that may be a personality disorder. You may be acting differently than everyone else, and certainly you can agree, and you must agree from your verdict, that that is exactly what Frank Spisak has done last year.

Now, let's go beyond that. Let's assume that you find that there is some evidence of mitigation for what he has done. If you find that, then you must go to the next step and say to yourselves is whatever I have found in mitigation, does that, or is that outweighed by the aggravating circumstances for which the defendant has been found guilty. And you are going to have to say we have found that not only did he kill the Reverend Rickerson, but during that course of conduct, he killed Brian, he killed Mr. Sheehan, he attempted to kill Coletta Dartt, and he attempted to kill John Hardaway, plus he went back and killed Mr. [2423] Sheehan to identify – or prevent him from being a witness to him, plus he robbed Mr. Sheehan, and you have the other aggravating circumstances that you convicted him of.

So what you do at the end, if you have found there are factors in mitigation, you take the aggravating circumstances on the one hand, and you compare them to the evidence in mitigation. And you say to yourselves, do the aggravating circumstances outweigh any factors that you have found in mitigation beyond reasonable doubt.

If you find that they do, then the law requires you to return a recommendation of death to this Judge. That's exactly what it is, the Judge has the ultimate say in what the sentence will be. If you recommend the sentence of death, it is a recommendation to him of that sentence.

And I say you keep an open mind as you have always had throughout the course of this trial. Don't be dissuaded, don't be nervous about what you are about to do. You have to follow what y our oath is.

Merely because you may find a [2424] psychiatrist or psychologist says there is something wrong with the defendant does not mean necessarily that the recommendation of death should not be submitted to this Judge.

Keep in mind, and you will hear – I won't go over – and I could produce all the evidence again, you have heard it, you know what it is. It is not going to be necessary. When you hear the evidence, keep in mind what the aggravating circumstances are that you have found him guilty of and compare that and ask yourselves as you are going along, as the testimony comes out, does this evidence mitigate in any fashion the conduct that this defendant has been convicted of.

Thank you.

EXCERPTS OF TESTIMONY OF SANDRA B. MCPHERSON, PH.D

[2425]

DIRECT EXAMINATION

BY MR. MCGINTY:

Q. Doctor, will you please state your name and spell your last name for the record?

A. Sandra B. McPherson, M-c-P-h-e-r-s-o-n.

Q. And, Doctor, where is your office located?

A. 2140 Lee Road, Cleveland Heights, 44118

Q. And, Doctor, what kind of doctor are you?

A. I'm a psychologist.

Q. And, Doctor, have you attended – did you attend undergraduate school?

A. Yes, I did.

Q. And where was that at?

A. At Kent State University.

Q. And did you continue your education?

A. Yes, I did.

Q. And where was that at, and in what field?

A. I received my master's and Ph.D. in clinical [2426] psychology from Case Western Reserve University.

Q. In what year did you graduate?

A. 1967.

Q. And have you had any other experience in the field of psychology since 1967?

A. I have been in practice since leaving school. Originally, I worked for the Child Guidance Center of Cleveland. I went into private practice part-time, and then full-time up until 1979, at which time a consulting physician with the Ridgecliff Hospital changed into a directorship of the Psychology Department there.

Q. Now, Doctor, are you licensed to practice psychology in the State of Ohio?

A. Yes, I am.

Q. And are you certified in any certain fields?

A. I'm Board certified in clinical psychology.

Q. Did there come a time when you had the opportunity to interview one Frank Spisak?

A. Yes, I did.

Q. Doctor, do you see him in the courtroom today?

A. Yes, I do.

MR. MCGINTY: Your Honor, would the record reflect that the –

Q. Well, where is he seated?

[2427] A. He is seated –

THE COURT: Well, the record may so reflect.

MR. MCGINTY: Thank you, your Honor.

Q. Do you recall when you had the opportunity to talk to Mr. Spisak?

A. I talked with Mr. Spisak in January, on January the 6th, in the morning, at the Justice Center.

Q. And, Doctor, during the course of this

interview, did you conduct any tests or techniques to Frank Spisak?

A. Yes, I did.

Q. And basically, what were the tests or techniques?

A. I interviewed him regarding his history, and the situation which had led to him being in the Justice Center. And I administered a Rorschach technique and he completed the Minnesota Multiphasic Personality Inventory, which was subsequently conveyed to me.

Q. Doctor, what, if anything else that you consulted during your examination, either before or after?

A. After seeing him and completing an initial analysis of the tests that I had done, I read the test results and reports obtained by the forensic center here in the Justice Center.

[2428] Q. Okay.

Doctor, after referring to the reports or after having your interview with Mr. Spisak, did you render a report?

A. Yes, I did.

Q. And, Doctor, after your interview and the tests that you conducted, and the techniques that you used with Mr. Spisak, were you able to formulate any opinions?

A. Yes, I was.

Q. Doctor, I want to ask you the question, do you have an opinion based upon reasonable medical and/or psychological certainty as to whether or not Frank Spisak has a mental disorder or defect?

A. Yes, I do.

MR. NUGENT: Objection.

THE COURT: Overruled.

Q. And what is that opinion?

A. I believe him to have a mental defect.

Q. Doctor, I want to ask you another question.

Do you have an opinion based on reasonable medical and/or psychological certainty as to whether or not Frank Spisak's mental defect substantially upsetted his capacity to appreciate the criminality of his conduct?

[2429] A. I do.

Q. What is that opinion?

A. I think it did substantially impair his ability to conform himself.

Q. And, Doctor, do you also have an opinion based on reasonable medical and/or psychological certainty as to whether or not Frank Spisak's mental defect substantially affected his capacity to conform his conduct to the requirements of law?

A. Yes, I do.

Q. And what is that opinion?

A. I believe that there was substantial interference with his conformity to the law.

Q. Now, Doctor, the opinions that you have just given are not the opinions or the diagnosis that you would use in the field of psychology, is that true, Doctor?

A. That's right.

Q. Doctor, basically what did you diagnose Frank

Spisak to be suffering from?

A. It was my opinion that he had the characteristics of both Schisotypal Personality Disorder and Borderline Personality Disorder.

Q. And, Doctor, the two terms you used, schizotypal and Borderline Personality Disorder, did you obtain [2430] that from some type of manual which clinical psychologists and psychiatrists use?

A. Yes, I did.

Q. What is that?

A. Diagnostic and Statistical Manual of the American Psychiatric Association, the third edition.

Q. And, Doctor, could you explain briefly to the ladies and gentlemen of the jury what is the purpose and function of this manual?

A. The manual sets forth in basically a theoretical. In other words, not from any one point of view, but rather from the best combination of clinical experience available, the characteristics that differentiate the different categories of mental conditions. These differences are listed out with their associated characteristic traits, behaviors. And it is the job of a commission to decide under which particular categories individual patients fall. When that is done, this permits or facilitates communication, because there is an agreed upon set of criteria between all clinicians using this system.

Q. Now, Doctor, the Schisotypal Personality Disorder you mentioned, can you basically explain to the ladies and gentlemen of the jury and the Court what is the diagnostic criteria?

[2431] A. Well, there are number of characteristics in this particular category, such as

magical thinking, thinking that is in some ways childlike, but bizarrely so, so bizarre, king of fantasize socializations, the tendency to have ideas about things, or about the world which are not true. Reoccurrent notions of what are called illusions. And in many cases, involving ideas of some force being present, or some set of operations in the universe that are not generally expected by the population.

Often there are oddities of speech or there are oddities of content of speech, but these do not reach the point of outright – of absolute outright illogical talk. They are superficially understandable, but they do not quite hold water. There may be too much vagueness, and the person cannot be pinned down very adequately, or there may be circumstantial aspects, or the particular metaphors that the person uses is strange. The person doesn't make contact with other people, doesn't relate well, doesn't form ideas that stand and have meaning, and identification across the line of relationship, there is always a lot of paranoid flavor ideas that there are things outside of self that are threatening projections of responsibility onto the rest of the world, or onto [2432] aspects of the world. There is a certain amount of anxiety and hypersensitivity.

And these things are present in greater or lesser degree. These kinds of things are atypical, and the so-called Borderline Personality is borderline conditions. They are conditions in which the ego doesn't function well. There is a lack of integration, a lack of adequate strength, personal strength for dealing with the world. The person is not so disintegrated that he is outright psychotic, that he is cowering on the floor, curled up in a ball somewhere and screaming, but there is clearly a distortion that goes forward much of the time in his thinking.

The condition can veer from relatively more intactness, more adequacy to relatively less.

Q. Now, Doctor, with that criteria in mind, which factor in Frank Spisak's makeup resulted in which diagnosis?

A. The more Schisotypal aspects.

Q. Why don't we just stick to the Schisotypal problem first.

A. Those are more evidence to me on his Rorschach examination which I also took at the Justice Center, because the thinking is very fluid.

[2433] Q. And Dr. McPherson, hold on one second.

What is the Rorschach exam? Let's tell the jury what it is.

A. The Rorschach is an ink blot test. Sometimes it is refereed to on television when we talk about mental problems. It involves showing an individual a series of cards, pictures on which are ink blots, which are made the way children often play. You put a glob of ink on paper and you go like that (indicating), and open it. You have designs. The designs are standardized, and there are norms. And we evaluate the responses of people against those norms for whether they are atypical, typical, or pathological, does the logic of how he came to the conclusion hold up, or not, well, just justified. It's a way of interviewing, if you will, except it is a very structured way. And it allows me to look at many other interviews, empty literature, so to speak, and see what the outcome means.

Q. When you said the word describing the Rorschach, you said there are norms that you can use, or are compiled.

Can you explain what that is, please?

A. Well, the book, the reference book for norms that is most in use was written by Marguerite Hearst, [2434] who is now in retirement, but was teaching at Western Reserve University, and is one of about five world authorities on the Rorschach. And she made it her life work to develop formative data to the Rorschach, so what we have out of her work is a fairly thick book with lists of responses to these cards, and what they mean. Whether they are good responses, unusual responses, pathological responses, and the like. And one feels one hypothesis is of what is going on, one's theories of personality by reference to this norm. And then by looking at the total sequence of responding to the contents in which it was done.

Q. Could you define now what the factors of Frank's makeup are?

A. All right. The most obvious Schisotypal aspects to his thinking do come out on the Rorschach when he gives very bizarre responses. There are a lot of responses on his Rorschach relative to what one exhibits, again, outside of the medical profession, to anatomy. And that will give you some flavor of how we do the Rorschach. If I have a surgeon on the Rorschach, I expect him to say more of anatomy responses, because you identify to anatomy. When I have one of no medical training, and he gives a lot of anatomy, and they are deteriorated or gory [2435] and involves blood, and this sort of thing, then I have an opinion that things in this channel is different to the ordinary, and that involves a great deal of quite grotesque things.

There are certainly occasions of the paranoid aspect to his thinking in the way in which he

construed the world, and this comes from interview. I have to skip around, it is a little bit easier. When he talks about being identified with Nazism, when he talks about a war against blacks, or I believe he has also described Jews and when he gets into notions that there are better sects of people, and more sects of people, and he is on some kind of mission, these are very paranoid ideations, some identification with these kinds of forces.

There is also the fear, and this is the very paranoid part of it, that his forces are going to overwhelm him, that's why he has to work in this way. And atypical paranoid mechanism is to be uncomfortable with something inside one's self, and to, therefore, not recognize it in the self, but see it outside.

And this is the kind of thing that anyone can do in very normal level, ways, but most people don't do much of. When you start seeing black as over [2436] multiplying and taking over the world, what you are talking about is some element of prejudice and hate within yourself, prevailed outward on, then you can fight against, and it is one way of avoiding getting in touch with your own fears about yourself.

The inadequate rapport is fairly clear. When he discussed the events with which he went through, that he did the murders that he was involved in, he has no affect. There is no emotional response. I have interviewed people before who have committed murder, and the typical response of even a person who committed murder is to feel something of the horror of that act. And discussing things with Frank Spisak that he did, it is a little bit like discussing what I had for breakfast. There is no appropriate response. And there is something very deficient in a personality that can't respond to horror of this type.

There is the socializing aspect. And there are occasions from the history that he has never really accepted. He was never really a member of the group. In fact, he was early drawn into the Nazism and so forth, because he really didn't fit with other systems of identification and peer group, but – peer group settings that most other kids do get [2437] involved in and grow in. He was certainly a social isolate as an adult where he could not tolerate marriage, or while he wound up living alone, he wound up living alone doing very unusual things. He is not a member of society, contributing, interacting comfortably.

These are the kinds of things that could be seen. One can look at his judgment and notions of how he functioned with respect to making decisions, many of which weren't even in his own best interests. His defect exceeds his own self preservation. Some of that shades into what I call Borderline Personality.

Q. Doctor, if I could stop you for a second.

In the classification Borderline Personality Disorder, would there be people within that classification of disorder who would be of more severe type, or less severe type, or is anyone within that classification the same type of sick person?

A. It is the former. There are people in both of these categories that are more or less sick, more or less impaired by the degree of their disorganization. My considered opinion of Mr. Spisak is that he is certainly more rather than less.

Q. Okay.

Doctor, you mentioned also that he suffered from [2438] this Borderline Personality Disorder.

Could you list those diagnostic criteria that you thought were more and those factors that Frank Spisak's actions showed, or existed?

A. Let me give a little bit of history for Borderline Personality Disorder. It is a category that has grown out of research and clinical practice over the years, but it did not get named as a diagnostic category itself until the DSM III came out, which was about three, four years ago.

It is an agreed upon clinical entity at this point. And there is plenty of literature over time to support that it was originally developed out of the notion that there are states of being which are neither neurotic of psychotic. Neurosis is something that we all have a little of and some of us have too much of and some of us go to psychologists or psychiatrists about, but we can function usually, except in very severe cases of neurosis, you can function. You have some conflicts, some anxiety, some inability to handle this or that, but the rest of your life works okay. Most neurotic conditions have a primarily learned component. You can learn ways of dealing with the world, that doesn't work well with psychosis. On the other hand, for the [2439] part, are not learned, they are conditions within the individual that distort the individual's capacity to deal with reality. They may emerge at birth, during the developmental stages of moving to adulthood, or they become manifest only in adults who are combining the organism and represent to the defect of chemistry, or metabolism about which we really don't know much yet.

The Borderline conditions are those which partake of the psychotic aspect, and which seem to have been in existence throughout the person's life in some sense, but which do not ever reach that point of

reduction of realities continuing, that they in psychosis, they change in psychotic statements from time to time and depending on the individual and the level of stress, so-called Borderline Personality involve impulsiveness, unpredictability of behavior, a lot of self-damaging sequence are seen among Borderline. These can be very overt kinds of things, suicide, self-mutilation attempts, or they can act out at the level of just doing things that consistently turn out badly, making very important judgments that anyone quote, unquote could make differently, and would know are stupid things to do if you want to survive in the world.

[2440] There is a lot of instability in relationships. Your relationships that are made can be intense at times, but they don't last, and they involve a lot of inappropriate dealings, and a lot of inappropriate interaction. Anger is usually intense. And loss of control is not infrequent. The most profound aspect of the Borderline Personality identity, the lack of knowing what the self is and all kinds of attempts made to find the self, which don't work.

In Mr. Spisak's case, he had the gender identification conflict, which is amply demonstrated in the point where he actually went for a sex change procedure, and then stopped it and went back to being a male. He in his history, he discusses thinking about whether he was male in history as early as the age of eight. So this identity disturbance is fairly profound and to have a sexual aspect to that, identify disturbance is very typical of Borderline Personality.

There is the emotional instability and yet a sense of chronic nothingness that often comes up, comes forth as well. These are the kinds of

characteristics that are seen in a Borderline Personality, and to which a greater or lesser degree [2441] characterized people so diagnosed.

Q. Doctor, in your report you used the words chaotic sexuality. Can you explain to the ladies and gentlemen of the jury what you mean by that?

A. Well, normal sexuality involves some focus and control and takes place within the context of a meaningful relationship between human beings. When I use the term chaotic sexuality, it is evidence from my test and from the history and from his discussions of himself, and the way he acts that he becomes sexualized in all kinds of situations. Obviously, homosexual contact can occur.

And therein, by the way, lies another paranoid device, because that's not acceptable, he then has to kill people that are homosexuals, or see them as coming onto him. And you get that kind of confusion. But the chaotic sexuality fuses his aggression with sexuality.

He gets rather excited with the idea of killing. He enjoyed riding around anticipating the kill. That's a very pathological state. He has a sexualized component.

Obviously, he was involved with women and was married briefly. Also involved with women on the prostitution basis. He complained of not being able [2442] to have enough sex at one point. These things all suggest an individual whose sexuality is out of control and attaches all over the place.

Q. Doctor, would the statement is his inconsistency consistent with his sickness a valid statement?

A. That would be a valid statement.

Q. Is that the way his makeup has brought him about causes the inconsistency, is that one of the hallmark terms or hallmark avenues that he displays?

A. If you don't have a sense of self that is reasonably well defined in the basic areas, sexuality, the basic roles you play, daughter, father, son, supervisor, whatever, if yourself cannot be consistent and work its way through the various roles in a coherent fashion, then you are moving into this kind of abnormal situation. And his inconsistency is a function of lack of inconsistent self.

Q. Doctor, you stated before that he enjoyed the act of killing. And in your report you stated that it was tension reducing, that there were some sexual or there was sexual gratification, and furthermore, he had some type of obsession with the use of guns, and a further obsession that he loved to read about the killing of others.

Can you explain to the jury about Frank's [2443] makeup there?

A. It's a little bit hard to elaborate on what you just said. He had a thing about guns. He got into it. It's interesting to watch, from his own statement, how he did that. Someone told him he ought to have a gun, according to this statement to me, and so he went out and he got one. And then he found that it was kind of nice to have, and so he got another one. Pretty soon, he is getting guns, he's got a thing.

He becomes very attached them. He doesn't want to get rid of any guns with which he had killed, that is clearly bizarre. It is very strange. And has to do with the meaning of killings.

He talked about making video tapes, or tapes

of some kind, I suppose they would have to be audio, making tapes, anyway, of news releases of the accounts of what he had done, so he could re-experience them. And he talked about the sense of tension feeling, and of feeling good when he had done a murder. That was a satisfying reliving kind of experience.

Q. Doctor, he has testified here in court to the jury of his hatred for blacks, but on the day of September 4, 1982 when he was arrested by the police, he was with a black woman.

[2444] Is that consistent with his personality disorder?

A. That's the kind of inconsistency that one would expect. He does not integrate anything, on the one hand he is saying that he hates black, and that he is afraid of blacks; on the other hand, he is intrigued by blacks, and again it is a sexualized kind of thing. It is a power thing. It is not an appropriate relationship between people that we are talking about with any of these things.

What he does with relationships involving himself with a black woman is a number of things at one time. He – because he chooses a woman on whom he views as quote, unquote inferior, he can then feel that he is superior, and he is no way diminishing her. On the other hand, he is also excited by the opportunity to be involved with this person, and what she represents. It is a very confused and – for me, both as a condition and person abhore the set of operations.

Q. Doctor, when do you first think he started to display signs of these disorders?

A. Obviously, signs probably in high school or

slightly later. Obviously, to other people when involvement with Nazism and the ways in which he related in his marriage and so forth. He states that [2445] he remembers being confused as to gender as early as eight. The lack of rapport with other people. Had there been someone watching to see how that got played out, it was probably very early on.

The sexualized thinking and the pathological thinking would have to go back as early as the age of two, because that's when those things are first differentiated, and then get moved onto the proper categories and proper control, which they never did in his case.

Q. Doctor, in the DMS manual, the third book that's out now, they have five different axes, and the – from what I could gather from this book, what you have just described is basically an axis two, is that correct?

A. That's correct.

Q. The five axes have to deal with a long-term outlook; is that correct?

A. That's correct.

Q. Could you explain to the ladies and gentlemen of the jury what Frank's long-term outlook is?

A. Well, in my report I rated him a six, which translates to very poor. And I think that's quite correct. His capacity to get better is very, very, very guarded.

[2446] I don't see him as a likely candidate for a – or any kind of remote cure. You know, he could be benefited by some ongoing treatment, and he could in a very structured situation maintain somewhat better integration than he does in an open situation. Left to his own devices, he will deteriorate

and move back into the undifferentiated states and be an aggressor, all kinds of behavior again.

Q. Doctor, is that consistent with the statement that Frank made on the witness stand that if given the guns, he would go back out and do the same thing again?

A. Yes, that's quite consistent with the statement.

Q. And, Doctor, the sickness he has at this time, they haven't made a pill in this case he takes that could make him better, have they?

A. No. Some of the psychotic types – at times he talks about having hallucinations and going through some disordered thinking that are more typically psychotic to the extent that he would manifest, that kind of seems, so to speak, he may be helped by some muraleptic medication, but in general, that – well, first of all, that would not change his essential personality defect, and lack of capacity to integrate, because it not specific for that. And secondly, [2447] it might assist in the transient psychotic situation, but then we would still have to kill the underpinning.

MR. MCGINTY: You Honor, may I have a moment, please.

THE COURT: Sure.

MR. MCGINTY: Thank you, your Honor. I do have a few more questions.

BY MR. MCGINTY:

Q. Doctor, could you briefly tell us the difference between a psychologist and a psychiatrist?

A. Certainly. A psychiatrist is an individual who goes to medical school and obtains a medical degree

and then decides to specialize in the study and treatment of mental illness. In order to do so, spends a period of residency in a mental hospital, or other, or another mental health agency, learning to identify, diagnose and find various treatments to mental conditions. The fact that this is a medical subspecialty focuses upon the abnormal range of behaviors, and also allows the person to learn and use the medical treatments such as drugs, electric shock therapy; and a part, after treatment, also used by psychiatrists, are psychotherapy, which is the process of talking with either in groups or individual settings, patients and essentially teaching [2448] through those conversations, which are very special in nature, new ways to think and deal with the world.

Psychologists obtain a graduate degree, a Ph.D. in psychology, and then serves two years of internship, some of which may be pre the doctorate, and a year of what has to be post-doctoral in a clinical situation. I'm speaking here now to a clinical psychologist, which is the subspecialty of psychology, that deals with mental disorders. Psychology, as a total field, is the study of human behavior. And the first two years of training are in the broad range of research and investigation into how people think and behave across the normal to the abnormal spectrum. The second two years are spent on the clinical obligations, and then a year of post-doctoral clinical supervisory experience occurs.

Psychologists learn to do, to use various instruments in the course of diagnosis, which allows them to pinpoint various aspects of thinking and behavior. So there are intellectual assistant instruments, such as the Wexler, or the MMPI, which is the personality issue and, there is and there

are the projectives, such as the Rorschach, about which I have already spoken. Psychologists also do psychotherapy, the conversations that are ended, [2449] the assisting people to new levels of adjustment. And very often psychologists and psychiatrists work together to carry forth a treatment program for persons who have different kinds of mental disabilities.

Q. Okay.

Doctor, you stated before that you were Board certified?

A. That's correct.

Q. Now, in clinical psychology, has there been a change in the past 20 years relative to that Board certification?

A. Yes. Growing out of the need for an emphasis on ongoing education and on specialization, there is a national Board certifying program. A person who has completed their doctoral degree, completed their internship and then has been in practice for a period of some three to four years, can petition for status as a Board certification candidate. After which there is an elaborate procedure involving submitting work samples and then going to one of the regional centers and sitting for examination, which is usually a day long procedure.

It is relatively similar to the Board certified procedures in medicine for specialties and in some ways is modeled thereon. And when the person has [2450] completed that, they have demonstrated to a group of their peers that they have a firm grasp on the specialty in which they practice.

Q. And, Doctor, you stated before you administered the Rorschach ink blot test?

A. That's correct.

Q. Are you qualified to administer that test?

A. Yes, I am.

Q. Have you taken any study on the administering of the test?

A. Yes, as part of the clinical training, the Rorschach is included as a projective technique. In my particular case I have been privileged to be in school when Margaret Hearst was a professor at Reserve. And, therefore, I studied a year with her. And also had her out during the time I was interning at the VA Hospital where she would conduct clinical supervisory type conferences. She would come in, look at what we would do, tell us how to perform tests, tell us how to improve and generally groom us so we would be reasonably good. One of my better education experiences.

Q. Sounds as though she was a good teacher?

A. Yes.

Q. And the Rorschach test that you administered to [2451] Frank Spisak then was following the lines you learned?

A. Yes, that's correct.

Q. Okay.

We heard a lot of testimony, and Frank has taken the stand, about the Nazism that he possesses and you made mention of it before, that it was in his early teenage years, and then other periods of time it shifted. This is something you think is serious with Frank, his Nazi beliefs, or is it something he is seeking out and searching?

A. I'm constrained to say that neither or those

exactly fit how I see it.

If he were what I would mean when I would say he was seriously involved in Nazism, that would mean that he believed that form of thought. I find that system of thought personally repugnant, but he would believe it, much as one has a religion, he would have Nazism, if you would; but that wouldn't necessarily lead to distortion, of reality. It would have a bulge of ideas in it that most people would reject, but it wouldn't be one necessarily to acts and behaviors in the society that he seems to go to and that he basis on this system.

His identification with the system is more like it becomes one of his props. And at times, he thinks [2452] at times, apparently, he has even thought he was Hitler at the time that I spoke with him, which he did not think he was Hitler, but he wasn't absolutely certain exactly what his relationship to Hitler was. He used words like, I guess, or I imagine, or whatever.

He is attracted by certain things in Nazism that seem to allow him to maintain control of all kinds of impulses that are very disturbing and troublesome.

Q. Doctor, in the field of psychology, if you were to take the numbers from one to 100 – zero to 100, and given the value zero to 100, zero representing we know nothing about it, and 100 as the most you could know about it, where do you think we are at right now in the field?

A. I would really like to make that a high figure, but I tell you, when it comes to minds, it is 40. I think we have got a long way to go before we really know what underlies the behavior of human beings in a definitive sense, in a sense that we can

accurately predict and accurately call back and say this is the cause of that.

Q. Doctor, you testified a little bit before about the – I don't know if you used the term, I think it is in your report, sexual gratification. All right.

[2453] He testified when he was on the stand that when he put the gun in his hand he felt good. All right. And he didn't necessarily tell us it felt sexually good to him.

Do you have any opinion or feeling about that?

A. Not specifically. I would have to be involved in interview to deal with that kind of data, because another aspect of guns is power. As a compensation for being an inferior, or feeling inferior. So it could partake a lot of that aspect as well.

Q. The feeling of power that you just stated, it's like it felt good to him, all right, I think we can say that.

How do you explain, or can you explain to the ladies and gentlemen of the jury then thereafter when the act is completed he has no feeling, of, you know, remorse?

Any emotion that this deed is done, it's over and he has no feeling.

A. That's part of being a defective personality. The natural and normal sequel to having done a terrible thing, isn't this emotionally, in some sense, strange. There is a lack, a very substantial one.

Q. The term personality disorder. I mean to a layperson here, it sounds – well, it is a personality [2454] disorder. I mean to a layperson we have a hard time assessing the value to it, but is it a sickness?

A. Not in all cases, and not in all manifestations.

Q. In Frank's case?

A. In Frank's case, I think it is.

MR. MCGINTY: Your Honor, may I have a moment, please.

THE COURT: Sure.

BY MR. MCGINTY:

Q. Doctor, is it a fair statement that Frank has a difficult time dealing in an unstructured type settlement, or situation?

A. Yes.

Q. Would it be fair to say that in a jail-type situation, a structured situation, that he could rate a little bit better than on the outside?

A. Most likely, yes.

Q. Doctor, during the examination that you conducted, and the test and techniques that you used to evaluate Frank Spisak, did you find any malingering?

A. Yes.

Q. And tell the ladies and gentlemen of the jury what malingering is, if you would?

A. It is a term that refers to an attempt to make one's self look more bad, more ill, more psychological [2455] upset, that one is, for some purpose to gain. It is also used in reference to medical illnesses as well, an attempt to make a medical illness look worse for some gainful purpose.

Q. Doctor, when you conduct R/O test that you use for techniques – is that what you used to get by it, the malingering problems?

A. Yes.

Q. And did you use those tests and those techniques?

A. Yes. It is not a matter of using some technique to confirm something else. It is a matter of how you analyze the results. In the case of MMPI, it's an extremely evaluated profile.

Q. Doctor, once again, what is MMPI, tell the jury?

A. Minnesota Multiphasic Personality Inventory.

Q. What type of test is it?

A. It's a 566 question, self-report questionnaire, and it is all true-false. It's scored with templates, or computers. The templates are laid over and you count the number of items of every given scale that is being used. And the profile is plotted, and the profile interpreted against what the norms are for that type of profile for which it is evaluated. And the norms relate to the different identified patient groups who had these kinds of profiles, and what they [2456] relate.

Frank's profile is an extremely evaluated profile, and both the main profile and the subscale analysis techniques used, suggest the principles of pervasive, unusual, bizarre kinds of thinking of a most exotic sort.

There is a specific set of scales that you score for to determine whether the person may be exaggerating their illness. And the scoring technique that reflects that best is what we call the F-minus Index, which we separate two scales, and subtract one from the other. His is well within the arena of distorting in the direction of making it worse.

Another thing that we know will affect the MMPI is use of chemicals, which is also true in his background, since the kind of experiences you get under chemicals are bizarre and unusual, and to put it in colloquy, rather graphic.

Q. When you say the use of chemicals, were those prescribed drugs used during the treatment, or anything like that?

A. No, according to the information that I developed, he was using various kinds of marijuana. I believe there was some other substances, as well, which would be obtained to treat illegally.

[2457] These would all tend to elevate the profile, as well. Some of the elevation would be used to his lack of ego, integration, that is apparent on the Rorschach, but the MMPI, in and of itself, cannot be taken to indicate the presence of psychosis, with that kind of profile made, because he has made it worse than it is.

Q. Doctor, I think you mentioned the term before, and I skipped over it, personality organization. Can you explain for us, if you will, what it is and then second of all, how Frank's organization was or is?

A. No specific unusual category meant by that term. It was just simply another way to talk about his lack of an integrated sense of self. I mean, at times he thinks he is one thing, at time he thinks he is another, at times he has some bizarre kinds of experiences, at times he does not. His behavior is at times lacking in judgment, in an extreme kind of degree.

He is capable of doing very, very bad things. He is capable of not appreciating in any emotional sense that he has done very, very bad things. He

rationalizes, because his rationalizations are basically illogical. So all of which points to the [2458] fact that he does not function as an integrated human being who puts things together and understands the world in a coherent fashion, relates to it coherent. I'm the same as I was yesterday, and will be tomorrow. I have some new experiences and I change my understanding of things, maybe hopefully, but the sense of me is always there. And I know who I am. That differentiates me from someone who has this kind of disorganized condition.

Q. Doctor, in your examination of Frank, you did the personal interview and the certain tests and techniques. Did you also review the reports of other doctors?

A. Yes, I did.

Q. In psychology, or psychiatry, you do what's known as a history?

A. Yes.

Q. And this case here, was a history performed?

A. I did some history taking in my interview, and there was also an extensive history developed from the Court Clinic.

Q. So you read the report of, I think it is, a Mr. Wulliger?

A. Yes.

Q. And you read the reports – do you recall who [2459] else, the reports you read, what doctors that you saw?

A. I read the reports of Dr. Althof and saw his test results.

Q. Okay.

Is he a psychiatrist or psychologist?

A. He is a psychologist.

And I read the reports of Dr. Resnick, who is a psychiatrist.

Q. Now that you had the opportunity of reviewing those reports, and the interviews, do you agree with the reports that were prepared by the others?

A. Yes, I think they are substantially – there is substantial agreement across all reports.

MR. MCGINTY: Thank you. No further questions.

THE COURT: Okay. This is probably a good time to take a break. We are going to work until about – this morning until about 12:30, quarter to 1:00. And then we will have lunch.

Remember the admonition. We will see you.

(Thereupon, a recess was had.)

THE COURT: You may be seated.

[2460] Mr. Nugent, you may begin your cross-examination.

MR. NUGENT: Thank you, Judge.

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EXCERPTS OF TESTIMONY OF KURT BERTSCHINGER, M.D.

[2508]

DIRECT EXAMINATION

BY MR. SHAUGHNESSY:

Q. Doctor, will you tell us your full name, and spell your last name for the court reporter, if you please.

[2509] A. Kurt Bertschinger, B-e-r-t-s-c-h-i-n-g-e-r.

Q. I have called you, doctor, tell us, tell the jurors, if you will, you are a medical doctor, aren't you?

A. Yes, I am.

Q. And how long have you been a medical doctor?

A I graduated from Ohio State University of Medicine in 1969. I had my medical degree since that time.

Q. You are licensed to practice medicine in the State of Ohio?

A. That's correct, yes.

Q. Now, doctor, I suppose I should ask you a couple questions here.

Are you located in Cleveland or in some other place?

A. I have a private office in Willoughby, Ohio. I have admitting privileges in Ridgecliff Pyschiatric Hospital, Willoughby, Ohio. And I'm Director of the Court Psychiatric Clinic for Lake County Court of Common Pleas in Painesville, Ohio.

Q. All right.

And Lake County is the next county over?

A. That's correct, just east of Cuyahoga.

Q. Where is your office at in Willoughby, Ohio?

[2510] A. At the Park Hill Professional Building, 33104 Euclid.

Q. Is that Downtown Willoughby?

A. No, it is approximately the corner of Euclid Avenue and Route 91, west of Downtown.

Q. Is that in Lake County Memorial Hospital?

A. Yes, it is.

Q. In that general vicinity?

A. Yes.

Q. You have been there how long, doctor?

A. I have been in private practice eight hours. This was after leaving the Navy.

Q. I might as well digress since you said the Navy.

You were in the Navy, presumably?

A. I was Lieutenant Commander in the United States Navy Medical Corps Service, Staff Psychiatrist of the Regional Medical Center, Portsmouth, Virginia.

Q. Tell us, if you will, what years you were in the Navy?

A. 1973 to 1975.

Q. And you were stationed where, doctor?

A. This was the Navy Regional Medical Center, Portsmouth, Virginia.

Q. And you were a Lieutenant Commander?

A. That's correct.

[2511]Q. Were you a medical doctor when you went into the Navy?

A. I had completed three years residency in psychiatry prior to entering the Navy, so I functioned as a psychiatrist for the Navy.

Q. What were your duties in the United States Navy?

A. Our department was in charge of both inpatient unit and outpatient facility for active duty personnel, as well as retired personnel. Our job was to treat those patients who were ill enough to be hospitalized. We saw multiple people as outpatients for treatment, or administrative discharge.

Q. All right. And you said your duty was to treat people that were sick enough, men, young women, who were in the Navy, are those the people, some of whom were sick enough? Is that you mean?

A. Yes.

Q. Navy personnel?

A. Navy personnel, retired personnel in that Portsmouth-Norfolk area.

Q. Kind of whatever walk of life, and there is some few people in every group that need some help from a person such as yourself?

A. Yes.

[2512]Q. It's true with the Navy, or Army, or telephone repairmen, or any other group?

A. Yes.

Q. Truck driver, maybe even lawyers?

A. Yes.

Q. Doctor, let's talk about your qualifications in this field.

I think you did tell us you graduated from – again, I didn't write it down, the medial school, sir, that you graduated from?

A. Ohio State University College of Medicine.

Q. And that was in 1969?

A. 1969.

Q. 1969.

The Ohio State University School of Medicine, that's a four or five year course, doctor?

A. That is a four year program, which one is involved in after obtaining a Bachelor of Science Degree.

Q. All right.

And you have a Bachelor of Science Degree?

A. I particularly have a Bachelor of Arts Degree from Case Western Reserve University.

Q. I see.

And you probably graduated then about 1965 from [2513] Case Western Reserve?

A. '65 from Case Western Reserve.

Q. '65. And did you attend high school, perhaps, in the community?

A. Shaw High School, East Cleveland.

Q. Shaw High School, East Cleveland.

So you are a native Clevelander then, or East Clevelander then, as the case may be.

After you graduated from Ohio State University, the School of Medicine, you took some internship, didn't you?

A. Yes, I did.

Q. And where did you do that, doctor?

A. St. Luke's Hospital in Cleveland.

Q. St. Luke's is 116th and Shaker Boulevard; is that right?

A. Yes, it is approximately.

Q. And do they have – what was the internship, was it a general or –

A. It was a general medicine internship with emphasis on medicine rotations through obstetrics, through gynecology surgery and psychiatry.

Q. And to practice medicine in the State of Ohio, you have to at least have a year of internship someplace, don't you?

[2514] A. At that time a year's internship was required.

Q. And you were at St. Luke's Hospital for how long?

A. For one year.

Q. That generally starts in June, doesn't it, and goes through the following May or something?

A. It started approximately July of 1969 after graduation from medical school and ran through the following July.

Q. All right.

When you become an intern, you are a doctor because you graduated from that, too?

A. Yes, it is necessary to graduate from medical school and take the State Licensing Boards.

Q. Interns, then, as we know from watching television, are generally young doctors?

A. Yes.

Q. All right.

And you are there to do kind of on-the-job training; isn't that true?

A. Training and education.

Q. And did you work in some various departments? St. Luke's is a big hospital, isn't it?

A. Yes, it is.

Q. And they do a number of different things there?

[2515] A. Yes.

Q. They have a number of different specialties that they do there?

A. Yes, they do.

Q. And they do just about everything there, don't they?

A. Yes, they do.

Q. How many areas did you get into during the year that you were there?

A. Well, it was over – I was on several general medical floors, both private and clinical services.

Q. Can you tell us what those were, doctor?

A. These are units where patients are admitted that have physical problems, such as diabetes, heart failure, pneumonia, stomach ulcer, something with

their gall bladder, any general medical problem.

Q. Fair to say first then you are a medical doctor?

A. That's correct.

Q. You have been trained, and you know those things that are medical?

A. Yes.

Q. Now, after your internship, your year's internship, what did you do then, sir?

A. I then went to Hanna Pavilion, what is the Psychiatric Section of University Hospitals of [2516] Cleveland.

Q. Back up just a second, if you will.

And the internship during the time that you were an intern, that's a pretty rigorous schedule. Do you work a lot of long hours, don't you?

A. Yes, you do.

Q. Are you on like 24 and off 24? How does that work?

A. We were on every day from probably six to seven in the morning until that night, in the evening, and then we were on every other night, which would mean you would be on 24 hours at one sting, but then you would go back the next day.

Q. And the reason you do that, or the reason I supposed that's done is so that the older doctor can get in a little golf while the intern is doing the work?

A. That's probably one of the reasons.

Q. That's what older lawyers do with younger lawyers, nothing really ever changes.

Doctor, you then went to St. Luke's and you

went to the Hanna Pavilion and that's at the University Hospitals. That's just right down the street here at the – in the Western Reserve Complex; is that not true?

[2517] A. That's correct.

Q. And you were there how long, sir?

A. For three years.

Q. Now, where you intern – or don't you have a kind of graduation there, and you become a resident?

A. Specialty training is referred to as residency training.

Q. Residency.

And of course, when you were an intern, you were licensed to practice medicine in the State of Ohio?

A. Yes, I was.

Q. And then quite obviously as a resident, you were licensed to practice?

A. That's correct.

Q. Now, when you got – incidentally, the Hanna Pavilion, that's a recognized psychiatric unit within the hospital, isn't it?

A. Yes, it is.

Q. And that's a well respected place, isn't it?

A. I believe that it is. It is a fully accredited program for the training of residents.

Q. All right.

And about how many doctors with the specialty of psychiatry are on the staff there?

[2518] A. Full time staff, probably 30 or probably more, I believe.

Q. 30?

A. 30.

Q. 30 or more?

A. And with the courtesy of the teaching staff, probably well over a hundred.

Q. All right.

And the Hanna Pavilion, too, it is nationally recognized, or statewide recognized?

A. Certainly statewide, as it is affiliated with Case Western Reserve Medical School, probably at least to that extent, nationally recognized.

Q. In the field then, it is a fully accredited and well respected hospital?

A. That's my opinion about the program, yes

Q. Sure.

And with psychiatry, and different psychiatrists have different opinions, don't they?

A Probably they do.

Q: Sure.

A. I will consider it to be a very well respected program.

Q. In any event, you were there three years. And you were a Resident then?

[2519] A. That's correct.

Q. What is a Residence? Tell the jurors what sort of things did you do?

A. The first year residency is primarily involved

in inpatient services. By that, I mean dealing with patients that are in the hospital. As a resident, one has the direct responsibility for care and treatment of patients under supervision of someone on the teaching staff. Later years primarily the last two, are more involved in outpatient treatment, seeing those patients that come on an outpatient basis, once or twice a week for therapy.

Q. You know at St. Luke's you were concerned with people who had physical – we might even say objective illnesses, a gall bladder, broken arm, black eye, in-grown toenail, or whatever. When you got up at Hanna Pavilion, you were concerned with people with subjective illnesses; isn't that true?

A. Yes.

Q. Diseases of the mind?

A. Correct.

Q. All right.

You did that for three years and then as I recall your testimony went into the Navy where you were for another two years; is that correct?

[2520] A. That's correct

Q. Another two years.

And you were Lieutenant Commander attached to the Medical Corps and your specialty there was psychiatry?

A. Correct.

Q. And since you are – or since your discharge then from the United States Navy, you have been in private practice; is that right?

A. That's right.

Q. Have you been at the same location all that time, or have you moved around?

A. I have been at the same private office for the entire eight years.

Q. Sir, are you connected with any other doctor or doctors?

A. Yes, I have a partner.

Q. And he is also a psychiatrist?

A. He has practiced in Willoughby for 25 years.

Q. And what is the gentleman's name?

A. Hellmuth Simon.

Q. He has been there 25 years as a psychiatrist?

A. That's correct.

Q. And he is well respected in that community, isn't he?

[2521] A. Yes, he is.

Q. Is your practice now limited to psychiatry, doctor, do you do anything else?

A. No, it is limited to psychiatry and forensic psychiatry.

Q. And I suppose we can stop there and say what's the difference between psychiatry and forensic psychiatry?

A. Well, generally, psychiatry would involve the care and treatment of patients presenting with some type of emotional stress.

Forensic psychiatry is better defined as psychiatry as it would interphase with the legal system.

So as a forensic psychiatrist, one, for example, may be involved in evaluating people as to whether they are competent to make wheels, or competent to enter into contracts. It might involve issues of child custody. It would involve things such as Workmen's Compensation cases, personal injury and then the whole gamut to the Criminal Justice Center system relating to people's competency to stand trial, issue of not guilty by reason of insanity.

Q. That's kind of the threshold issue, whether someone is even competent to stand trial?

[2522] A. That's the initial.

Q. Doctor, if you folks start out – of course, if you find someone incompetent, there is never a trial, is there?

A. There may never be, or at least that person would be referred to treatment until he is restored to competency?

A. Yes.

Q. You have a right to, again, you have to have some ability, or some competency, and whatever the yardstick is, or whatever that amount of competency is, you have got to have some level just to get into the courtroom and have a trial; isn't that true?

A. That's correct.

Q. Now, doctor, let's digress just a moment, again.

You are a psychiatrist and we have got 16 ladies and gentlemen here in the jury box, and probably another couple dozen in the courtroom. And I'm sure we have 40 different definitions of psychiatry, if we asked everybody. Might I ask you, sir, to look over at the jurors and tell them what

psychiatry is?

A. Well, I would define psychiatry as that specialty brand of medicine that's involved in the care and treatment of patients with emotional disorders.

[2523] Q. All right.

Doctor, what is an emotional disorder?

A. Some distress that involves a person's emotions, or feelings, or mood, or perception. Those things as separated from physical illnesses, per se, that one might present to a physician with the complaint of anxiety, depression, distortion of reality, a whole range of circumstances.

Q. Now, your definition of psychiatry, and the field of psychiatry, tell the jurors, if you will, just for a moment or two, how old a field is that? Is it something that's Twentieth Century, or is it something that predates that?

A. Well, it certainly predates that in an organized fashion, we are probably talking about, for example, psychiatric hospitals, or the first one in the United States was developed sometime in the 1700's. Freud and Second Dynamic Theory, we are talking mid-1800's.

Q. All right.

So at least 200 years in this country there have been what you called organized psychiatry?

A. I would say so, yes.

Q. If we were to ascribe the figure 100 to knowing everything we could about the human mind, about how [2524] it works, about diseases of the human mind, and if we were to ascribe the figure of zero to knowing absolutely nothing about those things, that

the hundred would be knowing everything about, where would you say the field of psychiatry, the field of psychology, as a profession is, where are we at this time?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, do we know more about psychiatry and the workings of the human mind than we did a year ago?

A. Yes.

Q. Do we know more than we did 200 years ago?

A. Yes.

Q. All right.

Have the views changed in the past 200 years?

A. Yes, they have.

Q. Have the views radically changed, have things that we thought 200 years ago were white, are they now black, or vice versa, if that's a fair question?

A. Yes. To give you an example, the first hospital in the United States had devices such as covering people's heads with a hood and spinning them in a chair as a cure for mental illness.

[2525] Q. Are you saying spitting?

A. Spinning.

Q. Spinning.

A. Spinning as a cure.

So I think we have come along way since then.

Q. And the people, the medical men back in that first hospital, that put hoods over people's heads, and

spun them around in a chair, they were respected medical men of the day, weren't they, doctor?

A. Yes, there were.

Q. And they are as respected as the medical men of today, weren't they, in that society?

A. I would imagine.

Q. But our views are different from their views?

A. Yes.

Q. As a matter of fact, it was a time in our own history when doctors, medical men, such as yourself, were called in to hearings such as this, to talk abut witches; isn't that true?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Have you read any of the history of psychiatry, doctor?

MR. NUGENT: Objection.

THE COURT: Overruled.

[2526] Q. And you know something about our own American history, don't you?

A. Yes, I do.

Q. And at one time in our history, we burned witches, didn't we, doctor?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. All right.

Fair to say though, doctor, that the way that the profession, the way that psychiatry handles problems today is different than it was a hundred

years, or two hundred years, even a year ago?

A. Yes, it is.

Q. All right.

In your view, sir, are we advancing, are we getting a better understanding of the way the human mind works? Are we better able to identify illnesses of the human mind than we were aware a year ago, or a hundred years ago?

A. Yes.

Q. Now, psychiatry – is psychiatry, is it a science, or is it an art, or perhaps it's a combination?

A. I would best define it as a combination.

Q. It is a combination.

[2527] Tell us in your words what is a science?

A. It is a body of knowledge from which one might start with theories, one might develop experiment tests, fan out, develop a certain validity about that, come to certain laws about the way something functions, and all of that would be a science. It is a rather hard predictable approach to a subject.

Q. Could you use the word objective as applied to a science?

A. Yes.

Q. and what does objective mean?

A. Objective?

Q. Yes.

A. That's what we are talking about, hard science.

Q. What does the word objective mean?

A. Well, that one can look at, for example, a piece of data and be certain time after time that one is making the same conclusion from that piece of paper.

Q. Sure.

Two and two is four, four and four is eight, that's a science, isn't it?

A. Yes.

Q. That's an objective finding?

A. That's an objective finding.

[2528] Q. If I come to you as a medical doctor and my arm is hanging at right angles, right in the middle, you can make an objective instant analysis that the arm is broken; isn't that right?

A. Yes.

Q. But if I come to you and say, and would say, my arm hurts a lot, and my fingers are swollen, and I can't feel anything, you might make a subjective analysis before you went and got your x-ray, that I might have a broken arm, because I have the symptoms?

A. We would make an inference, and proceed to try and validate it.

Q. Sure.

But in the latter case, where I say my arm hurts, and my fingers are swollen, and I can't move them, or feel anything, you can take me over to x-ray and then you can get it back into the objective, can't you, because the x-ray is going to tell you with absolute uncertainty whether it is, or isn't; isn't that right?

A. That's right.

Q. All right.

Now, let's talk about illnesses of the mind. Can you subject a patient to x-ray, or some objective [2529] test, to determine what that illness is?

A. To some degree, you can.

Q. We will talk a little bit more about that in a minute.

For instance, someone has cancer being removed, some part of tissue, and take it into a lab, and they can do some things and they can say it is malignant, or not malignant, and that is objective, isn't it?

A. Yes.

Q. And that's a science, isn't it?

A. Yes.

Q. Now, you told us what a science does. Tell us what the art is, or what an art is?

A. Well, an art is something that one does partly out of innate ability, and then combining that with science, or with some factual knowledge, or some skill, make some interpretation using a degree of creativity and performance, something out of that.

Q. All right.

And if psychiatry then is a combination of art and science, what does a psychiatrist do?

A. A combination of those two things.

Q. And the result is to hopefully either identify or end the emotional discomfort?

[2530] A. That's right.

Q. Is that true?

Now, doctor, you told us a moment or two ago about the threshold, the competency. And you saw Frank Spisak in this case, didn't you?

A. Yes, I did.

Q. And you can identify Frank Spisak in the courtroom, can't you?

A. Yes, I can.

Q. The fellow over there in the brown coat?

A. That's correct.

Q. And you have talked to him, haven't you?

A. Yes, I have.

Q. He is the only reason you are here and you know why you are here, don't you?

A. Yes, I do.

Q. And when did you see Frank Spisak?

A. I saw Mr. Spisak on the 17th – I'm sorry, the 18th of February, 1983.

Q. All right.

And you saw him, somebody asked you to see him, didn't they?

A. Yes, they did.

Q. And who asked you to see him?

A. You had asked me to see him.

[2531] Q. All right.

And I think you probably talked to Billy McGinty, didn't you?

A. I have talked with him, and I directed a report to you in writing.

Q. Fine, sir. All right.

In any event, it was the defense lawyers representing Frank Spisak that said to you, doctor, would you talk to Frank Spisak?

A. That's correct.

Q. Let me digress, and not to be rude, but I forgot. You told us in addition to your private practice you do something with the courts in Lake County, and that's in Painesville?

A. Right.

Q. Tell us a little bit more about that, and then we will go on and talk about that.

A. All right. The area of Forensic Psychiatry, as you had asked me, is a specialized area. First of all, it requires specialized training to be involved in this area.

I had in 1979, '80, partially left private practice, returned to Case Western Reserve University for a year, post-doctoral Fellowship in psychiatry and the law. This is a year's specialty training in [2532] the area that involves courses in the law, called in a sense, tutorial with Dr. Resnick, which is the director of the Court Clinic here in the area of the psychiatry and law. This was in a sense in conjunction with my work at the Forensic Psychiatric Clinic in Lake County. We do at that clinic the comparable task that the Cuyahoga County Forensic Clinic does.

Q. Of course, you told us, Dr. Phillip Resnick is the Director here?

A. Yes

Q. You know Dr. Resnick, don't you?

A. Yes.

Q. And he certainly is a most respected, most able man in your profession, isn't he?

A. Yes, he is.

Q. All right.

And you worked with Dr. Resnick in the past?

A. I worked very closely with him for that year of postdoctoral Fellowship.

Q. All right.

And in every respect, he is a professional, and a gentleman, isn't he?

A. Yes, he is.

Q. All right.

[2533] Now, do you do the same kind of thing you started to tell us in Lake County that he does in Cuyahoga County?

A. Yes, sir.

Q. And how long have you been with the courts in Lake County?

A. For approximately five years.

Q. And while Resnick is the Director here, what is your title in Lake County?

A. I'm the Director of that clinic.

Q. Do you have any assistants, or any other people working with you?

A. Yes, we do. We have a full time Master's level social worker, we have a psychologist.

Q. Now, a psychologist, doctor, tell the folks what is a psychologist?

A. A. psychologist is a professional that has had training in the area of psychiatry. They may function in a different level of certification. One might, for example, have a Master's Degree, and be considered a psychologist. Treating, to be a treating psychologist in practice, one would have a Ph.D., a Doctorate in Psychology, might do these things in treatment of patients.

Q. All right.

[2534] I suppose if I hear it another dozen times, or so, I will know the difference between psychiatry and psychology. I don't right now.

Would you tell us just a little bit about the difference?

A. The primary difference is a psychiatrist is first a physician, has had all the training through internship that any other physician would have. Whether that physician would go in cardiology, or pediatric surgery, neurology, that training is the same. One then specializes in either psychiatry, or general medicine, or obstetrics, or gynecology.

So the big difference is that the psychiatrist has medical training. A psychologist proceeds academically through a university training program in psychology, but has no training in medicine.

Q. All right.

The two specialists, or professions, they relate and they are what we call an interplay between the two, isn't there?

A. Yes.

Q. And the psychologists are helpful to the psychiatrist, aren't they?

A. Yes.

Q. And the psychiatrists are helpful to the [2535] psychologists, aren't they?

A. Hopefully.

Q. And the aim of everybody being helpful with everyone is to ease the emotional distress?

A. Yes.

Q. That may be an over-simplification though, isn't it, doctor?

A. Well, we were quite closely, for example, at Ridgecliff, where we have both disciplines. And the psychologists perform an important service in terms of psychological testing, which in turns helps us psychiatrists with diagnosis, so there is quite a close interplay.

Q. Maybe as an example, do you possess the Rorschach? I always have trouble with that.

Is that a tool used by psychologists primarily, or by psychiatrists, or tell us a little bit about that?

A. Generally speaking, the psychologist is the expert in the field of testing, psychological testing. There might be a few psychiatrists that have studied that, and perhaps feel competent in administering, or interpreting, but not generally.

Q. Sir, do you get into a category – are you competent in administering it?

[2536] A. No, I am not.

Q. You are not.

Do you in the normal course of your professional duties, do you use that test, the Rorschach?

A. I would use that in the sense that I might ask

a psychologist to administer and interpret the test, unaware of whether the test might be helpful for me, and I might ask a psychologist to do it, but they would be the person administering it and interpreting it.

Q. All right.

Now, that's an ink blot test?

A. Yes, it is.

Q. And as a psychiatrist, then, do you look at the ink blots and come to your own conclusion, or do you accept the conclusions that the psychologist who administered it would give you?

A. Personally I accept the conclusion of the psychologist who administered it.

Q. Do you know a psychologist by the name of Sandra McPherson?

A. Yes, I do.

Q. How long have you known her?

A. I would say at least three years.

Q. And that has been on a professional basis?

[2537] A. That's right.

Q. You and she have worked together?

A. That's right.

Q. And have you worked together on cases that didn't involve crime as well as cases that involve crime?

A. Yes, we have worked both areas.

Q. All right.

And maybe in the three years that you have

known her, how often have you worked with her, once a month, or twice a month?

A. As far as criminal practice, we both, as you know, are at the same hospital. Dr. McPherson is employed by Ridgecliff Hospital. I'm on the medical staff.

Q. I see.

A. So that we frequently have interaction around the clinical treatment of the patient.

Q. Sure.

A. We perhaps have been involved in a half dozen forensic cases where we both by coincidence were involved in the same case.

Q. And when you use the word interaction, you mean that she would do one thing and you would do another thing, and you would work together?

[2538] A. That I might request a test, that she would perform the test, given an interpretation of that test. We would confer about a patient and perhaps just treatment approaches.

Q. Sure.

And in the field of psychiatry, that's the accepted way of practicing, isn't it?

A. Yes. We often do.

Q. Today?

A. Right.

Q. Sure.

Today, like I think you said a minute or two ago in the first hospital, they probably had somebody putting the hood on and somebody else spinning the chair and that was the accepted way then, wasn't it?

A. It might have been.

Q. Sure.

Now, Dr. McPherson is a psychologist?

A. Yes, she is.

Q. All right.

And you told us a minute ago there were different kinds, some have Master Degrees, and some with Ph.D.?

A. Ph.D.

Q. Doctorate?

[2539] A. Doctorate.

Q. And do you know what kind she has?

A. Yes. She has a Ph.D., and a licensed clinical psychologist.

Q. All right.

And is she respected in her profession?

A. To my knowledge, yes.

Q. Did Dr. McPherson do some tests in the case of Frank Spisak?

A. Yes, she did.

Q. And did you use any of those tests, or rely on any of those tests, in your work with Frank Spisak?

A. I looked at those tests. To say that I relied upon them is somewhat difficult to answer. I formulated my own opinion, and I did have her testing available to me.

Q. Sure.

And she did a Rorschach test, didn't she?

A. I believe she did.

Q. And what is an MMPI?

A. MMPI is the Minnesota Multiphasic Personality Inventory.

Q. And you don't administer that test yourself, do you?

A. No, the test in a sense is a self-administered [2540] test. It is a true or false response that the patient does, and then the psychologist interprets.

Q. What you meant, doctor, you don't do the interpreting; somebody else does?

A. The psychologist does.

Q. Sure.

Is that interpretation of the MMPI, is that an objective interpretation, or is that a subjective interpretation?

A. It's a subjective, but more objectively, for example, than the Rorschach.

Q. If as I understand to get the answer, or to rate the answer, you put on these five-hundred-and-some questions, you put some templates over it, and however, over a computer, and however it comes out, that's the way, if I did it, or if you did it, or Don Nugent did it, kind of comes out the same way if we know how to do it?

A. The mechanics of recording, or transferring the answer on a graph, to the MMPI graph, anyone could do that with training.

Q. Sure.

A. The interpretation of that pattern is somewhat objective, but also subjective in nature.

Q. All right.

[2541] But whoever designed the templates, then that was subjective, but whoever uses the templates, or the things that overlays, that's objective, we just put it into a computer and it fits an answer?

A. That basically it is a mechanical, and objective.

Q. All right.

Rorschach?

A. Rorschach.

Q. Rorschach, right. I will practice in the hallway after the session.

Is that objective or subjective?

A. No, it is quite subjective.

Q. It is quite subjective.

And each psychiatrist then may see something differently in that test?

A. Yes. Again, there are some standardization of tests, but one psychologist might make different interpretations from the same finding than another psychologist.

Q. There was such a test done, or both tests, the MMPI and the – that test in this case; is that true?

A. Yes.

Q. And when you became involved in this test, did you look at those results and did you study those [2542] results?

A. Yes, I did.

Q. And did you rely on those results at all in

forming any opinion?

A. Again, I would say that I formulated my opinion based on my own clinical observation. Certainly, the testing is helpful to the degree that it substantiated what I felt was present clinically.

Q. All right.

Now, doctor, I think it was February, did you say, February 10th, is that when you saw Frank Spisak?

A. That's correct, yes.

Q. Where did you see him?

A. I saw him in the Justice Center.

Q. And was that in a – well, it was in the jail part, but was it in the jail environment? Did you go in behind the bars, or do you have a visiting room, or how did you conduct the interview?

A I saw Mr. Spisak in the court psychiatric clinic.

Q. And that's like a doctor's office?

A. Yes.

Q. It is a large room?

A. Yes, it is a large area, but it is a series of private offices. And I saw Mr. Spisak one on one. There was no one else present at the time.

[2543] Q. When you saw him, he wasn't under any sedation, or pills, or anything of that sort?

A. Not to my knowledge.

Q. Not to your knowledge. All right.

And was that interview private, or was he guarded? Do you remember the type of interview?

A. It was private.

Q. It was private.

And when you talked to him in the jail setting, you knew that he was accused of killing three people, didn't you?

A. Yes, I did.

Q. And you knew that he was accused of trying to kill two others?

A. Yes.

Q. And did you personally feel secure? You weren't afraid when you talked to him, were you?

A. No.

Q. And let me digress, kind of a general question. Your work as the Director of the Unit in Lake County, and your private work, do you do things the same way if you were – if this had all happened in Lake County and the Judge out there, the lawyers out there, said would you see Frank Spisak, and you are now the Director of the Psychiatric Clinic, would [2544] you do anything any differently?

A. Well, as Director of the Clinic, I'm really coming in as an impartial examiner appointed by the Court, one. And I might say my opinion of the way I approach the case, I'm always impartial, but the impartiality, as part of the Court Clinic, allows you access, for example, to records that you otherwise very seldom have access to.

Q. What kind of records are those, doctor?

A. The prosecutor's file and the police report, for example, when we see a case in the Court Clinic, we are automatically given those records to review.

Q. Sure.

And if you are hired by the defense, as you are in this case, you have access to my file, but understandably, not the other side's file, right?

A. I had very little success in obtaining that type of record.

Q. There is nothing wrong with that. That's as it should be, because this is an adversary proceeding; is that true?

A. It is an adversary procedure, yes.

Q. But in your interviewing, in your preparation of the case, other than reading the prosecutor's files as you would in Lake County, do you approach it [2545] the same way?

A. That's correct.

Q. And when we asked you to see Frank Spisak, we were first concerned with competency, weren't we?

A. Yes.

Q. We talked about competency, whatever that level is, and that's competency, you have got to get over that threshold before you can even have a trial?

A. Correct.

Q. All right.

Doctor, tell the ladies and gentlemen why in this country, why do we start out, in the field of psychiatry, and all of us, why is it necessary that someone be found competent before you can even have a trial?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Well, needless to say though, that's where we

start, right?

A. That's where we start.

Q. You told us that. All right.

And that was one of the things that the defense in this case asked you to look into, didn't they?

A. Yes.

Q. And of course you knew then that the lawyers in [2546] this case weren't psychiatrists, or psychologists, or social workers, and they were just lawyers?

A. Yes, I did.

Q. And you are a professional and you have a particular profession; isn't that right?

A. Yes.

Q. And if you had a sore throat, you wouldn't go to a lawyer and ask what's wrong with your throat; you would go to another doctor, wouldn't you?

A. Yes.

Q. And if you had a toothache, you would go to a dentist, wouldn't you?

A. Yes.

Q. And if lawyers don't know if the guy is nuts, they send him to a psychiatrist, don't they?

A. Yes.

Q. And we did that, didn't we?

A. Yes, you did.

Q. As a matter of fact, what we said is, doctor, we have got a guy here, and we want you to tell us if he

is competent to stand trial, right?

A. That's right.

Q. And you approached that, and you did some things, you interviewed him, and you read some [2547] reports, didn't you?

A. Yes, I did.

Q. And you ended up telling us very obviously that he was competent to stand trial; isn't that right?

A. That's right.

Q. And that's one level, whatever it is, or one yardstick, however long it is, you had to find out some things there, didn't you?

A. Yes.

Q. And what did you find out about Frank Spisak that led you to the conclusion that he was competent to stand trial?

A. Mr. Spisak was in touch with reality at the time I talked with him. He was able to answer questions relevant to the questions that I was asking. He was aware specifically of the charges against him. He knew the courtroom procedure and the nature of the trial process. And he was able to relate facts pertinent to questions that he was charged with. One of the things that we have to look at is can the person cooperate with his attorney to prepare a defense for trial.

Q. Now, we could have answered that question probably without coming to you, but there are other questions, aren't there, relative to other issues [2548] relevant to competency, and you answered those, didn't you?

A. Yes. We used what's called the Magarite

instrument, and this was developed by a psychiatrist. It covered approximately 12 or 13 different areas that someone assesses with respect to a person's competency to stand trial.

Q. And you found that he was competent?

A. Yes, I did.

Q. And it's a psychiatrist who makes a determination, not the lawyers, no matter how smart the lawyers may think they are, right?

MR. NUGENT: Objection, Judge.

THE COURT: The objection is sustained.

Q. All right. In any event, doctor, when we talked to you about Frank Spisak, we asked you to do some other things, didn't we?

A. Yes, you did.

Q. And what was the other things that we asked you to do?

A. To approach evaluation, to answer the issue of whether Frank Spisak was mentally ill, and whether he met the criteria for legal insanity.

Q. Whether he was insane then?

[2549] A. Yes.

Q. And did you kind of figure out the defense might have had an opinion that he was insane and wanted a doctor to agree with us? Did you kind of get that idea?

A. I got the idea that you felt he had some significant emotional problems.

Q. And you gave us a finding, didn't you?

And your finding was impartial and honest

and maybe something we didn't want to hear, right?

A. That's correct.

Q. What did you tell us, doctor?

A. I told you bottom line that Mr. Spisak in my opinion could be diagnosed as schizotypal personality disorder. I indicated to you that my own feeling was that this clinical picture that he printed was of such severity that one could consider that to be mental illness. And that Mr. Spisak in my opinion did not meet the criteria for legal insanity.

Q. Would you kind of say that maybe he was close but no cigar?

MR. NUGENT: Objection.

THE COURT: Will you kind of say that?

Put another question.

[2550] Q. Kind of say that. What would you kind of say, doctor, if you had to kind of say something?

MR. NUGENT: Objection.

Q. Well, what did you say?

A. I said that Mr. Spisak in effect met the first prong of the statute which is the test of legal insanity, in Ohio, and that prong is that he has a mental disease, or defect. And then I said I felt he did not meet the other prong, of the remainder of the test, and the test is that he would not know the wrongfulness, or have an inability, total inability, to refrain from the acts.

Q. Now, you are a doctor and you are a professional, right?

A. Yes.

Q. And presumably you are proud of your

profession?

A. Yes.

Q. And your diagnosis was a professional diagnosis, it wasn't covered by what I might have wanted, or Billy McGinty would have wanted, or Jack Gardner may have wanted, was it?

A. No.

Q. You went right down the middle?

A. I went right where the diagnosis was.

Q. You told us what the diagnosis was, not what we [2551] wanted to hear; is it fair to say that?

A. Presumably, yes.

Q. You talked about prongs, about the first prong, and then, however, the diagnosis didn't fit as to prong – the second prong. That's not a very good question.

But in any event, part of it fit, whatever the definition was, but part of it didn't fit; is that right?

A. That's right.

Q. So there is an objective, there is an objective standard, isn't there, in evaluating this guy is over this line, and he is insane, and this guy isn't over this line, and he is not insane, or legally insane, right?

A. That's right.

Q. What is insanity, doctor?

MR. NUGENT: Objection.

THE COURT: Overruled.

THE WITNESS: Insanity is a legal term, it is not a medical term. Insanity is in Ohio what the

Staten decision says that it is. And that is that a person first be mentally ill. The wording of that is that they have a mental disease, or defect. The mental disease [2552] or defect must cause such an impairment in reason that they either do not know wrongfulness, or have an inability to refrain, and that's insanity, and that is the legal definition.

Q. All right.

Now, doctor, you know the nature of the hearing that you are now testifying in, don't you?

A. Yes, I do.

Q. And what is it?

A. It's the mitigation phase after verdict.

Q. Now, you told us what the definition of insanity is. And you have written a report. And you have given a diagnosis now; is that right?

A. That's right.

Q. How did you diagnose Frank Spisak?

A. My diagnosis of Frank Spisak is schizotypal personality disorder.

Q. Is that a mental disease, or defect?

A. In my opinion it is.

Q. And do you know the standard, or the measure, or the yardstick, what-have-you, that is applied at this hearing?

A. Yes, I do.

Q. And what is that?

A. The wording of it is much like what we might call [2553] in forensic psychiatry, a softened Staten decision, it's a softer wording of the Staten decision

in Ohio. It talks about substantial inability to know wrongfulness, or substantial inability to refrain, rather than total black or white.

Q. So the purpose in this kind of a hearing then is different than if you were going to testify about whether a guy is insane or not at trial; is that true?

A. That's true.

Q. You use the word substantial.

Do you have an opinion based on reasonable medical or scientific certainty – I better read this question – whether at the time of the commission of the offense if Frank Spisak, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law?

Do you have an opinion there, sir, based on reasonable medical certainty, or scientific certainty?

A. Yes, I do.

Q. And what is that opinion?

[2554] A. It is my opinion that Mr. Spisak was mentally ill, and that that mental illness does impair his reason to the extent that he has substantial inability to know wrongfulness, or substantial inability to refrain.

Q. All right.

If it was a little bit more, the substantial, and I supposed everything relative to extent, if we increased that substantial, if you can do that, we would reach a point where one would be legally insane, wouldn't we?

A. You would eventually, yes.

Q. How close to being legally insane is Frank

Spisak?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Do you have an opinion based on reasonable medical or scientific certainty as to how close to being criminally insane Frank Spisak is?

MR. NUGENT: Objection.

THE COURT: Overruled.

MR. NUGENT: Objection.

THE COURT: Overruled.

THE WITNESS: No, I don't have an opinion.

[2555] Q. You don't have an opinion. All right.

Now, doctor, you did a history when you did the work that you did with Frank Spisak, didn't you?

A. Yes, I did.

Q. And in your profession, is taking a history, is that part and parcel of the expected way of doing what you did?

A. Yes, it is.

Q. And tell the jurors, if you will, what is a history?

A. The social pertinent of the history for Mr. Spisak, some things that apply, for example, to finally making a diagnosis of schizotypal personality disorder, if you look back to the early school years, for example, he was very much on the perimeter of the group. He had a difficult time relating to other children. He had very poor eyesight, and therefore, he was apparently excluded from physical activity,

participating in the gym and swimming. He was a scapegoat, is the best way to describe it, as he described it. He could not adequately relate to people, and out of this, then developed some identification with powerful figures and powerful groups. This is where the identification with the Nazi movement started.

[2556]Q. Let me digress and ask you about that.

The identification with the Nazi movement, do you know when that began?

A. That began approximately at age 14.

Q. And how do you know that, doctor, just because he told you, or based on some reasonable medical or scientific, or medical knowledge, based on what other doctors may have told you, how did you come to that conclusion?

A. I know that directly from Mr. Spisak saying that that was so.

Q. All right.

A. Beyond that, for example, Mr. Williger had prepared quite a complete report, there was a social history.

Q. Now, who is Mr. Williger?

A. He is a social worker with the Court Psychiatric Clinic in Cuyahoga County?

Q. And he is respected in his field, isn't he?

A. Yes.

Q. And he works under Dr. Phillip Resnick, doesn't he?

A. That's right.

Q. And you could rely on Mr. Williger, couldn't

you?

[2557] A. Yes. My feeling was that I could.

Q. And did you rely on Mr. Williger in this case?

A. I did.

Q. To some extent, or great extent?

A. To the extent that rather than interview a variety of people, I accepted the information that he had gathered from people such as Mr. Spisak's mother, sister, father. And there were other persons, but those are the primary people out of the remote past.

Q. Now, you yourself, if you are asked, you are going to say, well, personally, I talked to Frank Spisak, and he said he was involved, or became interested in Naziism, when he was 14, and you didn't personally go out and talk to all of the names that Mr. Williger did to substantiate that, but you took Mr. Williger's word for it?

A. That's right.

Q. And Mr. Williger works for Cuyahoga County Psychiatric Unit, worked under Dr. Resnick, right?

A. That's right.

Q. So Dr. Resnick, and as part of your history, he made a report similar to yours, didn't he?

A. Yes, he did.

Q. And as a matter of fact, your reports were quite [2558] similar when they came out, weren't they?

A. In their conclusion, yes.

Q. In the conclusion.

And you respect Dr. Resnick, don't you?

A. Yes.

Q. Even though in this case, for what it is worth, you are on different sides?

That really has nothing to do with it, does it, because you are a professional?

A. I believe that as forensic psychiatrists we do approach this impartially, whether we are Court Clinic people or quote hired by defense people.

Q. All right.

You are trying to be true to your profession, and you were in this case, and you agreed with Dr. Resnick, didn't you?

A. Yes, I did.

Q. And you used, and agreed with Mr. Williger in his opinion, didn't you?

A. Yes.

Q. And there was another doctor at the Clinic, I can't think of his name. Did you see any other reports?

A. Dr. Althof's report.

Q. .Dr. Althof, excuse me. I didn't remember the [2559] man's name.

Do you know Dr. Althof?

A. Yes, I do.

Q. How long have you known him?

A. Two to three years.

Q. And he is a psychiatrist?

A. No, he is a psychologist.

Q. A psychologist, Ph.D.?

A. Yes.

Q. The same field then as Dr. McPherson?

A. Yes.

Q. All right.

And you respect Dr. Althof?

A. I do.

Q. Same respect you have for Dr. McPherson?

A. Yes.

Q. And did he do the Rorschach, or Worschach, or whatever it is?

A. Yes, Rorschach, and MMPI, a battery of psychological tests.

Q. Being subjective, or objective, did they come pretty close to the findings of Dr. McPherson?

A. Yes, I believe that they did.

Q. Probably wasn't a nickel's worth of difference between them, was there?

[transcript page missing from record]

[2560] neat and tidy, and others may not be. Someone may be very outgoing, or they may not be. These are traits. When those traits develop to a severity, they impair where the person's statements, social and occupational, are not functioning. By that, largely, it is when he seems to get to the point where it interferes with the running of living, then we call that a personality disorder.

Schizotypal is a descriptive category, as are most of the schizactricsynosis, it describes one who has profound disturbances in his thought process, in their perception, in their behaviors. It describes one who, much like Mr. Spisak, has a rather withdrawn and isolated lifestyle, has eccentric, or has been in eccentric thinking, or has severe difficulties in interrelationships, and with dealing with day-to-day living.

Q. Is schizotypal, is that in the category of schizophrenia?

A. It may be a forerunner to schizophrenia.

Q. That's the word I wanted, forerun.

A. The reason that the category was developed was to distinguish those people who were seriously impaired in terms of mental ability, but did not meet the criteria to be diagnosed as a schizophrenic. [2561] Our new manual has gone much farther than DSM-2 in referring specific criteria for a diagnosis. In an old manual, it was more descriptive. We now have got patients, for example, if you feel demonstrate two of the following five fingers, and if you can't do that, then you can't, strictly speaking, diagnose someone in that category.

So schizotypal describes one who is close to the schizophrenic, but does not meet the criteria for schizophrenic.

Q. Now, the symptoms that Frank Spisak has under the old manual, and that's five or ten years, isn't it?

A. Yes.

Q. All right.

Under the old manual would have been

classified as a schizophrenic; would he not?

A. Not in my opinion, no.

Q. No?

A. No. No, that he would even then meet the diagnosis for schizophrenic.

Q. Not even then.

Well, right now and right then, I suppose he was schizotypal?

A. At that time, he would be in DSM-2, he might [2562] have been called a schizoid personality severe, again, as descriptive, category.

Q. You used the word severe. And severe kind of means what it says, doesn't it?

A. Well, descriptively makes graduation to say that the character traits were of a mild level of disturbance, to that person, or they were severe, just as it would state that those characteristics were of such magnitude that the severity impaired function.

Q. And your descriptive words, do you get any higher than the word severe?

A. No.

Q. You don't have a category that's – very well. They do on Madison Avenue, all new, new, new, new, could be very, very, very severe, or you just stop and say severe, and say that's the highest that we go?

A. Well, it's important for me to say that that is not part of the official category. We do that clinically. If you look at DSM-3, it simply says schizoid person, or schizotypal personality. We might tack on, if you will, another descriptive word, mild or severe.

Q. Well, now this guy over here in the brown coat, [2563] you used the word severe when you talked abut his schizotypal disorder?

A. Yes.

Q. And that's an impartial decision on your part, isn't it?

A. Yes.

Q. And does that opinion agree with the opinion, the diagnosis of Dr. Phillip Resnick?

A. I don't know. I don't believe that Dr. Resnick added on a word saying severe or not. His description, certainly, is one with a severe impairment.

Q. And you have Dr. Resnick's report, don't you?

A. Yes, I do.

Q. How long of a report is that, sir? I'm not gong to make you read it, just tell me how long the report is.

MR. NUGENT: Objection.

THE COURT: Is there an objection?

MR. NUGENT: There is an objection.

THE COURT: Objection sustained.

Q. Well, you used Dr. Resnick's report in getting a history of this case, didn't you?

[2564] A. Yes.

Q. And you agree with Dr. Resnick's report?

A. Yes.

Q. And you used Dr. Althof's report?

A. That's correct.

Q. And you agree with Dr. Althof?

A. Yes.

Q. And they agree with you, presumably?

A. Yes.

Q. Have you seen any other reports, or –

A. There were outpatient clinic records from Cleveland Metropolitan General Hospital that was involved with a sex change procedure.

Q. Did you get any kind of report from the Metropolitan General in that area?

A. I have copies of the records from Mr. Spisak's clinical contact with Metro.

Q. Did you use those records at all? Do they become part of your history?

A. Yes. They certainly substantiated Mr. Spisak's statement that he was interested in and pursued a sex change operation.

[2565] Q. All right.

He told you something, and here is some record information that proved it to you, right?

A. Yes.

Q. And was that information helpful to you in reaching your diagnosis?

A. Yes, it was.

Q. And did the records that you have, did they reflect the taking of any drugs back in Metropolitan General, some years ago?

A. Yes.

Q. What kind of drugs are those?

A. Mr. Spisak was for a period of time, and I would have to look at the record –

Q. Why don't you look at the record.

THE COURT: All right. This is probably a good time to take a break.

(Thereupon, a recess was had.)

THE COURT: You may be seated. You may continue your examination.

Q. Doctor, when we broke here a few minutes ago, we were talking about as part of your history you got some reports from the Metropolitan General Hospital. And I think I asked you about drug usage relative to treatment there.

[2566] Have you had the opportunity to look back through the history that you prepared, which is included in that report?

A. Yes, I have examined that report.

Q. And as a psychiatrist in this kind of a case, getting reports from various places, that's the accepted way of putting together a history, isn't it?

A. Yes, it is.

Q. That's the way the respected psychiatrists throughout the country do it, isn't it?

A. Yes.

Q. And you did that, didn't you?

A. This was obtained in relation to –

Q. Have you had the opportunity to look at that report?

A. Yes.

Q. Frank Spisak in your interview told you about

a sex change, or his thinking about it, didn't he?

A. Yes, he did.

Q. Just the fact that someone might think about a sex change, and the fact that sex changes are generally the subject of jokes and laughter, and reasonably so –

MR. NUGENT: Objection.

THE COURT: Overruled.

[2567] Q. Just because someone would seek a sex change, doesn't mean that he is insane, does it?

A. No, it doesn't.

Q. Does it have anything to do with insanity in and of itself?

A. In and of itself, no.

Q. Just kind of a preference one may have?

A. A preference stemming out of some real biological drifts, apparently.

Q. So there could be a biological reason for a sex change, independent of maybe a screwed-up mind?

A. Yes.

Q. Now prior to doing whatever the doctor does in performing the sex change, psychologists and psychiatrists are used, aren't they?

A. Generally, they are.

Q. And for how long a period of time?

A. In most cases, at least for an evaluation to screen a candidate for a program of this sort.

Q. I mean, how long is the treatment before the actual surgery?

A. The physical treatment?

Q. Yes. How long does the psychiatric treatment last?

A. The psychiatric treatment might be limited to [2568] an evaluation, perhaps, three sessions. One may prepare a short, simple saying, this person should, or could be enrolled in a program of that sort.

Q. And are any drugs administered at any time?

A. Yes, they are.

Q. What kind of drugs?

A. Estrogen.

Q. And Estrogen is what, sir?

A. Estrogen is a female hormone.

Q. And if I were to take some Estrogen pills, what happens?

A. In general, you would lose some configuration of body hair, such as beard, some loss of hair under your arms, or under your arms reverting with hair patterns, for example, to a more female configuration, rounding over the lips, development of breasts. That type of response is to Estrogen.

Q. How do you spell Estrogen?

A. E-s-t-r-o-g-e-n.

Q. And did Frank Spisak take medication?

A. Yes, he did.

Q. Are there any objective findings as to whether it did this, Estrogen, did those things it is supposed to do?

A. In the letter from Dr. Kavesa summarizing [2569] treatment, yes.

Q. Dr. Kavesa is a medical doctor, but is he a psychiatrist?

A. I don't believe he is. He is a Ph.D. by his title, and apparently, was involved in that program for transsexual surgery.

Q. Sure.

And did it say for how long a period of time the drug had been used?

A. The date of this letter is June 2, 1978. The statement is made that the candidate has been taking estrogen for six months, prior to that, to the date of that letter.

Q. Taking that drug, is six months kind of a long time?

I mean in six months, does it do a lot of things that it is supposed to do.

A. Well, mentioned in the letter, there was some breast development. Apparently, there were at lest the beginnings of what one would expect Estrogen to do.

Q. All right.

Now, when you interviewed Frank Spisak on the 18th of February, 1983, how long did you spend with him?

[2570] A. Two-and-a-half hours.

Q. That's the only time that you saw him, isn't it?

A. That's right.

Q. And you haven't seen him again until today, have you?

A. No, I have not.

Q. In addition to seeing him for two-and-a-half hours, though, you did do all of the things, the reading of the reports from the doctor, as you have told us about?

A. Yes, I did.

Q. A matter, just on the chronological order that they have them, do you read the reports first and then do you talk to Spisak, or was it the other way around?

A. I read the reports and talked with Mr. Spisak. I read the reports again.

Q. And you –

A. I formulated and put on paper the reports that you have.

Q. Now, doctor, talking to Spisak for two-and-a-half hours, and doing what you did, was that enough, was that enough, for instance, the time that you spent with him, two-and-a-half hours, not really a [2571] long time, is that enough of a basis on which to form your opinion?

A. Yes.

Q. Now, you didn't talk to him, obviously, preparatory to your testimony in this case of this trial, did you?

A. No, I did not see him again.

Q. And would it be necessary to have talked to him this morning to give us the diagnosis that you have given us?

A. No.

Q. Or yesterday, or the day before?

A. No.

Q. Would talking to him again have been helpful to you?

A. No.

Q. And you talked to the defense lawyers back in February, didn't you?

A. Yes, I did.

Q. And earlier you told us the threshold, or the first question, the primary question was competency; isn't that right?

A. That's right.

Q. And did we talk about any other things back then?

[2572] A. We talked about the issue of legal insanity.

Q. Did we talk about anything else?

A. We talked about the eventuality that there might be a phase of the trial process, the mitigation.

Q. Was it just an eventuality, doctor?

A. The statement in effect was made that I would probably be testifying at this stage of the trial.

Q. At this stage, this is what is really the ball game; isn't that right, sir?

A. Yes.

Q. And the lawyers didn't know, or didn't use words like schizotypal, did they?

A. No.

Q. We wanted to know if the guy was nuts, didn't we?

A. That's what you asked me, yes.

Q. And, doctor, it doesn't take two-and-a-half hours to reach your diagnosis, does it?

A. No, not actually.

Q. A guy looks at Frank Spisak, if you didn't have any of these reports, and you didn't have the business from the Metropolitan General Hospital, and if you didn't know what Dr. Althof and Dr. McPherson had done, and you talked to him for a few minutes, five or ten, you could kind of get a good flavor of [2573] what their ultimate diagnosis would be, couldn't you?

A. I'm not sure about five or ten minutes, but one gets a sense in spending even a short amount of time with Spisak that he has some profound disturbances.

Q. Sure.

Just as layman, we can kind of all perform quick judgments and we can kind of pick a jerk out in the bar, don't we, and know he is a jerk? We all have that ability, don't we?

MR. NUGENT: Objection, Judge.

MR. SHAUGHNESSY: We all have that ability?

THE COURT: How does he know what bars he goes to?

MR. SHAUGHNESSY: Pardon me?

MR. NUGENT: How does he know what bars he goes to?

THE COURT: What bar do you go to?

MR. SHAUGHNESSY: Why don't I withdraw the question.

Q. You didn't find it surprising that after his

lawyers talked to him, they came to you and they [2574] found something wrong with him?

MR. NUGENT: Objection. There is absolutely no evidence that there is anything wrong with him.

MR. SHAUGHNESSY: I will withdraw it.

(Thereupon, a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

BY MR. SHAUGHNESSY:

Q. Doctor, in any event, those things that you did, they are the accepted way that you psychiatrists do it, fair to say that?

A. Yes, it is.

Q. And another two-and-a-half hours this morning, or two-and-a-half days, wouldn't materially assist you in reaching your diagnosis or conclusion?

A. No, it would not.

Q. Now, before you talked to Frank Spisak, did you know what he was accused of doing?

A. Yes, I did.

Q. And how much detail did you know?

A. I did not know the details at that point. I knew the charges.

Q. And obviously, you read the papers and listened [2575] to the news, you knew when somebody said Cleveland State killings, you knew what they were talking about?

A. Yes.

Q. If the bathroom were on the third floor, or first

floor, maybe you didn't know that, but you knew generally what it was about?

A. Yes.

Q. Had you read – you didn't read any police reports, did you?

A. No. There were some – well, no. I have to refer that – I was going to say that Mr. Williger has summarized that which he usually would do, but his statement in the report, in the prosecutor's file was unavailable, meaning in essence the police reports were unavailable.

Q. In Dr. Resnick's report, that's 20 pages, or something, isn't it?

A. I have to look at it.

Q. Is there, just yes or no?

A. It is a substantial report.

Q. There is detail about each offense, isn't there?

A. Yes.

Q. And you read that both before you talked to [2576] Frank and after you talked to Frank, right?

A. Yes.

Q. And as the Director of a Psychiatric Clinic in Lake County, if you were doing, as you said, you are Dr. Resnick's counterpart, of course, he interviewed him first, presumably, Dr. Resnick read some police reports, because you do if you were out in Lake County, wouldn't you?

A. I would do that, yes, if I were.

Q. I mean you assume, don't you, that Dr. Resnick had the police reports and things?

A. No, I don't assume that. Sometimes we don't get them either.

Q. Oh.

A. It depends on the prosecutor and whether even our clinic – the prosecutor may not always turn over reports. So I don't assume it.

Q. Just to clear things up. I didn't give you any police reports, did I?

A. No.

Q. And you know if I would have had police reports?

A. No, I don't.

I assume if you had, you would have given them to me as they would have been helpful.

Q. You assume correctly then, doctor.

[2577] Now, you do have a copy of your own report, don't you?

A. Yes, I do.

Q. And what date did you make that?

A. The report was dated March 1st.

Q. All right.

And the things that you put into the report, is that substantially what you told us here today on the witness stand?

A. Yes. I have other detailed notes regarding some past history and some of the events that took place.

Q. Let me hand you then Defendant's Exhibit I. Take a moment, if you will, doctor, and look that over and kind of get a sense of what it is and then tell us

about it.

A. This was my report, or letter to you regarding the issue of sanity at the time of the acts.

Q. And you got your signature on it?

A. That's right.

Q. And the March 1st date?

A. Yes.

Q. Now, you said sanity at the time of the acts. Did it have any other observations in there?

A. There were observations, for example, mental [2578] status, examination diagnosis, some statements about past history, indication of material I used, reviewed, I did not, for example, say anything on the issue of competency, that's prepared as a separate report.

Q. All right.

A. Competency to stand trial.

Q. Sure.

This second last paragraph says here, "Generally speaking, personality disorders are not considered to be mental disease or mental illness when being used in an insanity defense."

It says that, doesn't it?

A. Yes, it does.

Q. "However, it is my opinion that Mr. Spisak's personality" – what's that word?

A. Personality deficit.

Q. " – deficits, are of such severity that he can be considered to have a mental illness or mental disease."

That's in there, isn't it?

A. That's in there.

Q. And that was your conclusion back on March 1, 1983, wasn't it, your diagnosis?

A. Yes, it was.

Q. And that's your opinion today, isn't it?

[2579] A. Yes, it is.

Q. And that was an opinion that you, or a diagnosis that you arrived at after talking with Frank Spisak for two-and-a-half hours?

A. Yes.

Q. After reading Dr. Phillip Resnick's twenty or so page report twice?

A. Yes.

Q. After reading Dr. Althof's report, or background findings twice?

A. Yes.

Q. After reading Dr. Sandra McPherson's reports?

A. That's right.

Q. Plus the results of the MMPI?

A. The MMPI.

Q. And that other one that starts with an "R", you read that, too, didn't you?

A. Yes, I did.

Q. All right.

And that was your opinion then, and it is your opinion now?

A. That's right.

Q. The guy is sick, isn't he?

A. Yes.

Q. How sick?

[2580] MR. NUGENT: Objection.

THE COURT: Overruled.

THE WITNESS: Quite sick.

Q. Will he ever get any better?

A. Personality disorders are not very amenable to change. Even with treatment, he may get somewhat better, but the core symptoms in my opinion will not significantly change.

Q. We can't let him go and give him his guns back and send him back to East 53rd Street, can we, doctor?

A. Absolutely not.

Q. Because he would be a menace to society, isn't that right?

A. Most probably he would, yes.

Q. And he is sick, isn't he?

A. In my opinion he is.

Q. And that's why we can't give him his guns back, because he would kill them, wouldn't he?

A. Yes, he probably would.

Q. And we have places, we have places where we put people that we can't let back out in society, don't we, doctor?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

[2581] THE COURT: Sustained.

Q. You folks used the expression a structured environment.

Tell the jurors what you mean by a structured environment?

A. What we mean in psychiatry is generally speaking a hospital. It is an environment where one is provided with some framework under which he could conduct day-to-day activities. Structured means a person is given a prong, an activity card given up front, what's expected, or given a schedule around which they compose their lives on a day-to-day basis.

Q. Is jail a structured environment?

A. Yes, it is.

Q. In a jail, you can't get your guns back and go out and kill people, can you?

MR. NUGENT: Objection, Judge.

THE COURT: Sustained.

Q. Now, doctor, some while ago when we started out discussing, you told us about the mitigation, or the mitigation factors relative to psychiatry. You told us about that, didn't you?

A. Yes, I did.

Q. And you answered the question of whether or not [2582] at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law. You have answered that question, haven't you?

A. Yes, I have.

Q. Now, as a psychiatrist, doctor, as one who serves both as a doctor and a psychiatrist, and an expert for the defense, who has a private practice, who has had three years residency in psychiatry at the Hanna Pavilion, who served honorably and as a psychiatrist in the United States Armed Forces, do you know why this condition is a mitigating factor?

MR. NUGENT: Objection, Judge.

THE COURT: Approach the Bench.

(Thereupon, a sidebar discussion was had between Court and counsel out of the hearing of the jury on the record as follows:)

MR. SHAUGHNESSY: The question is, and we are now, obviously, to state the obvious, we are in mitigation. I think we have more latitude, and I think it is an appropriate [2583] question anyway. The question is kind of this, based on his expertise, why in our society does such a defect become a factor in mitigation. And I think that the answer, and I haven't –

THE COURT: Here, I will tell you what the answer is on the record, because the Legislature deemed that there is mitigation. I'm not sure if it is a mitigating factor, based on what you said.

MR. SHAUGHNESSY: Let me – apparently

THE COURT: The Legislature put it in mitigation in the statute. That's a legal question.

MR. SHAUGHNESSY; I think that, but I think it goes beyond that.

And I think that the Legislature – simply to say that because the Legislature has done it, that's the obvious. What is also –

MR. NUGENT: The Legislature –

MR. SHAUGHNESSY: Don, I don't interrupt you, and I haven't interrupted you for six weeks, please.

THE COURT: Go ahead.

MR. SHAUGHNESSY: The reason is, and [2584] it goes right back to the Judio-Christian Foundation that all our laws spring from, and it goes back to the Baltimore Catticism –

THE COURT: The course of all –

MR. SHAUGHNESSY: You know, I don't shake my head.

MR. NUGENT: I don't say dumb things like that.

MR. SHAUGHNESSY: I'm going to start picking on you.

THE COURT: Keep your cool.

MR. SHAUGHNESSY: I think we should, and this is the ball game, and the doctor stated it exactly right, that all of this does go back to the ability to commit a sin, and that's exactly why we don't. That was the first question, why don't – why do we have the competency hearing, because we don't try an insane man.

Why don't we try an insane man, because in a very well sense, he can't commit a sin.

What he is testifying to here is that the guy is a little bit insane. He is not insane enough to be declared legally insane. I'm paraphrasing it now, but why do we do it, and [2585] it's important, and it's a mitigation hearing. And I think it is very important because it goes right back to the very foundation of

our law. And that is the ability to form the intent to commit the sin, to commit the crime.

I think the jurors are entitled to know, you know, why in organized society do we do this. Let's say the Legislature has said that it is mitigation, let's accept that, but there is reason for it. And the reason is that our ability to form the intent while not completely diminished –

MR. NUGENT: He never said his ability to form intent was diminished in any respect. The answer is a matter of law. You never asked him one question about intent, notwithstanding that, you asked why the killing is against the law. To me that's – he is not qualified to answer it.

THE COURT: Off the record.

(Thereupon, a sidebar discussion was had between Court and counsel off the record and out of the hearing of the jury.)

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[2586] (Thereupon, the following proceedings were had in open court:)

BY MR. SHAUGHNESSY:

Q. Doctor, you told us about what the law is relative to the mitigation. You already told us that.

You told us about Frank Spisak's condition, haven't you?

A. Yes, I have.

Q. And you put that in your report, didn't you?

A. Yes.

Q. All right.

Why, if you know, why do we in an organized

society make such defects as you have talked about, or diseases, why do we make that a factor of mitigation?

A. My understanding of that is that clearly it is a societal decision, and society, through the Legislature, has made it a decision that there are certain factors that will excuse one from the death penalty. As in mental illness, if the crime is a product in a sense of that mental illness, it becomes one of the factors that would lessen the severity of the sentence.

Q. Why should a diminished mind, if you will, or a sick mind, using your words, excuse one from the death penalty?

[2587] MR. NUGENT: Objection.

THE COURT: Sustained.

MR. SHAUGHNESSY: May I have five seconds?

THE COURT: Sure.

MR. SHAUGHNESSY: Thank you so much, doctor.

Your Honor, at this time we have no further questions.

THE COURT: Thank you, Mr. Shaughnessy.

Mr. Nugent.

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EXCERPTS OF TESTIMONY OF OSCAR B. MARKEY, M.D

[2659]

DIRECT EXAMINATION

BY MR. SHAUGHNESSY:

Q. You want to adjust that microphone, Dr. Markey, or would you just prefer not to use it?

A. I would just as leave talk directly, if I can be [2660] heard.

Q. Fine, sir. You can.

I know that you testified before some few days ago, but we probably have to start that again.

Tell us your full name and spell the last name, if you will, Doctor, so that the court reporter gets it down in her record.

A. Oscar B. Markey, M-a-r-k-e-y.

Q. And I called you Doctor, and you told us that before, but tell us again, you are a medical doctor, aren't you?

A. I'm a medical doctor.

Q. You are licensed to practice medicine in the State of Ohio?

A. Yes, I am.

Q. And I think you told us the other day that you have been licensed about 60 years. Just again, for the record, we have to go through it, if you will, tell us when you were licensed, that will be helpful.

A. I was licensed in Ohio in 1923, began the

practice in 1926.

Q. Do you follow any particular specialty in the medial profession?

A. Psychiatry.

Q. And how long have you followed that specialty?

[2661] A. Well, from 1926 to the present time, which is about 57 years.

Q. Now, Doctor, tell us about yourself, something about your qualifications. Why don't we start with when you went to undergraduate school, the place and what years?

A. University of Pittsburgh, School of Medicine, graduated in 1922.

Q. And after your graduation in 1922, what did you do then?

A. I was an intern. Then I had a two-year residency in pediatrics in Chicago.

Q. So that is in chronological, tell us the internship and where it was.

A. Western Pennsylvania Hospital, Pennsylvania, Children's Memorial Hospital in Chicago.

Q. Now, the internship in Pittsburgh, was that in the general field of medicine?

A. Yes.

Q. Was there any emphasis or any psychiatry involved at all in that period of your career?

A. No, sir.

Q. You spent the usual one year internship.

Then after graduation from medical school you then moved on to Chicago and then had a fellowship or residency?

[2662] A. Fellowship with a national committee for mental hygiene was from 1924 to the end of 1926.

Q. Is it fair to say, then, that in 1924 you started, or got into your specialty, the field of psychiatry?

A. That's right.

Q. And you were in Chicago, did you say?

A. Yes.

Q. As I recall from your testimony the other day there was some connection with the University of Minnesota?

A. Yes. My fellowship was first in Minneapolis, and we were assigned to the University of Minnesota. There was no Department of Psychiatry there. And I had some of my psychiatrists visiting nearby in Rochester, Minnesota. I can say that when I came back to Chicago, I was at the Institute for Juvenile Research. I was primarily interested in troubled children.

Q. You told us something the other day, and maybe you can tell us again, the Institute for the Juvenile, that was kind of a new field at that time, wasn't it?

A. Yes.

Q. And your specialty or your practice had been largely concerned with troubled and mentally ill children; isn't that what you said?

A. Largely, yes.

[2663] Q. And you told us the other day that in order to specialize in any particular age group that

you had to be fully accredited and well versed in all fields of psychiatry and you are, aren't you, Doctor?

A. In general psychiatry as well as child psychiatry.

Q. You had then the several years, two years, was it, residency in Chicago?

A. My Chicago amounted to almost three years in Chicago, Minneapolis and partly here with the opening of the Child Guidance Clinic.

Q. And you came to Cleveland then and you say that was the opening of the Child Guidance Clinic?

A. That's right.

Q. In Cuyahoga County?

A. Yes.

Q. And there hadn't been a Child Guidance Clinic before that time?

A. No, sir.

Q. So you were in right from the beginning then?

A. That's right.

Q. What was the Child Guidance clinic, or does it still exist or –

A. It still exists. The purpose was that we believed by that time that difficulties in adjustment, by either becoming troublesome or troubled, very likely in most [2664] instance, began in childhood, and perhaps even in infancy. And that was our purpose in trying to demonstrate through the formation of this clinic that we could help children and in that manner perhaps reduce the frequence of maladjustment in adults.

Q. Now, how long did you work with the Child

Guidance Clinic here in Cuyahoga County?

A. Until 1927. Then it became an independent organization supported by the United Fund and from its own fees. I didn't continue with them, but I maintained relationship with them.

Q. And do you still maintain your relationship with the Clinic?

A. They tell me that I once served on the board of Directors. I'm not sure that I remember that, but I'm still actively concerned, and I visit with them until this day.

Q. Fine.

Now, is it about that time when – well, anyway, during that time you were a medical doctor and you were licensed to practice in the State, there came a time, and I will try to speed through this, if I can, that you went into private practice here in Cleveland?

A. That's right.

Q. I think you said you were at 77th and Euclid [2665] Avenue?

A. 71st.

Q. My error, Doctor.

And you were there a number of years, I believe, up until the war, or am I wrong?

A. That's right. When I came back, I didn't go to that same office.

Q. So from some time in the late '20s until what, about 1941, '42?

A. That's right.

Q. 1942 you went into the Army; is that right?

A. That's right.

Q. And your rank, again, sir?

A. My final active rank was lieutenant colonel in the medical corps.

Q. And you were with the Tenth Army in the Pacific; isn't that right?

A. That's right.

Q. And you were the chief psychiatrist, and you had how many people working for you? How many psychiatrists?

A. Probably between 12 and 15. I can't recall. We used to try to get more.

Q. I see.

And your duties with the Tenth Army were what, [2666] Doctor?

A. To help soldiers who were having difficulty prior to battle and as a result of battle.

Q. Fair to say that in all walks of life soldiers, truck drivers, electricians, lawyers, just people that need the help of a psychiatrist?

A. We had referrals of at least 4,000 during that battle.

Q. And there were a lot of troubled people in the military?

A. Yes, there were

Q. And when you were with the Tenth Army in the Pacific, that was a war zone, wasn't it?

A. That's right.

Q. And were you treating such things as battle fatigue?

A. That was our chief concern.

Q. And your concern, your concern as you say was battle fatigue, not necessarily a question of sanity or insanity? Maybe I'm phrasing that wrong. But you were there to help with emotional problems and emotional problems with real roots you were in a battle zone?

A. Well, we were more successful with people who broke down early than with people who broke down later, for various reasons, but we were able to get most of [2667] our soldiers to return to active duty.

Q. What rank did you go – what rank were you when you went in?

A. Major.

Q. You went from a major then to a lieutenant colonel?

A. That's right.

Q. Did you start out as the chief in charge of psychiatry in that medical division?

A. In the training areas in the United States, I was chief, in the training area where new soldiers were sent, and in that manner I was able to help some through avoiding getting them to be released from possibility of military, of battle service and some were sick enough to be discharged.

Q. Doctor, kind of a general question, if I might.

The methods of treatment, the things that you did in the war zone in the Pacific, the methods that you employed, are they the same methods that are used today in and generally accepted in the medical field of psychiatry?

A. Pretty largely, yes.

Q. Is the field of psychiatry advanced from those war days in 1940?

A. I think particularly since 1954 when new medica-[2668]tions were developed, and they have their problems, too, but we think that it has been very helpful.

Q. Now, the field of psychiatry is like any other field if it's changing and progressing, you have to keep up with it, don't you, Doctor?

A. Yes.

Q. That involves a lot of reading, doesn't it?

A. Yes.

Q. Have you taken any additional courses, or gone to seminars, that sort of thing?

A. This is to be expected, and yes, I have.

Q. Just in the last year or two years, have you been to any seminars, or have you followed up with any readings?

A. There are, I think every year, I attend some of these, yes.

Q. Now, you told us the other day that when you came home from the war that there was a time when you became associate professor at Case Western Reserve?

A. That's right.

Q. And then it probably wasn't Case Western Reserve?

A. It was Western Reserve.

Q. It was Western Reserve.

That Major, what was that, a dozen years ago that the –

[2669]A. Something like that.

Q. And Western Reserve is a respected university throughout the country, isn't it?

A. I think so.

Q. There is a school of psychiatry at Western Reserve, isn't there?

A. There is a Department of Psychiatry.

Q. Department of Psychiatry.

And how many professors, how many teachers are there in that Department of Psychiatry?

A. In here, you mean in Cleveland?

Q. Yes.

A. It would be difficult for me to say. I haven't noted, but I would say there are full time people and there are clinical professors, and instructors, I would say well over 100.

Q. And Western Reserve, now Case Western Reserve, it is a fully accredited medical school, isn't it?

A. Indeed it is.

Q. And it is nationally quite well respected, isn't it?

A. I believe so.

Q. And the professors, the teachers and the associates there, are good men, aren't they?

A. They are well recognized.

[2670]Q. And they are respected men?

A. Yes.

Q. How long did you teach at Case Western Reserve?

A. Until 1941, and then when I came back, part time perhaps until from 1946 to '52 or '3.

Q. So totally then nearly 20 years then with the medical school.

Do you have any relationship with the school now? Do you ever do any guest lecturing, anything of that sort?

A. Not at the medical school, no, but I do a good deal of this at various national meetings I mentioned the other day.

Q. Tell us just a little bit more about that, if you will.

A. Well, because of the nature of my training, I was one of the founders of the American Academy of Child Psychiatry in 1953. The first such academy in the world. And then later when the general psychiatrist wanted to form a special organization in 1963 to '65, called the American College of Psychiatrists, I was one of the first members of that. I had to be involved in programs pretty nearly every year in both of those areas.

Q. And for something more than 50 years then you have [2671] been active in your field?

A. I would say so, yes.

Q. All right.

Now, Doctor, tell us a little bit about your field. What is psychiatry?

A. A psychiatrist is a physician who studies the nature of the mind, the difficulties of thinking, acting

and feelings, and it involves studies of the body and its various systems. It involves direct attention to and work with the individual where – whether they are children or adults. So that his subjective report can be made part of the diagnostic examination.

Q Digressing for just a minute, where are your offices at now, Doctor?

A. 14100 Cedar Road.

Q. And there is a name on that building, isn't there?

A. Medical – May Medical Center.

Q. May Medical Center. And that's on Cedar Road in South Euclid?

A. That's right.

Q. Near Warrensville Center Road; isn't that right?

A. Yes.

Q. And they probably get the name for the medical building because it is next to the May Company Department Store?

[2672] A. I think it is on part of the property which once belonged to the May Company.

Q. And you have been there how long, Doctor?

A. About four and a half years.

Q. Now, Doctor, you have told us about the field of psychiatry. What is psychiatry? Tell us, is psychiatry, is it a science or is it an art, is it a combination of both?

A. It is a combination of both.

Q. And if we are talking about a science, I

suppose, first, we ought to ask you what a science is.

A. Well, a science can be objectively reinforced by other people who will be respectful of the findings because they are objective.

Q. Now, mathematics, for instance, is a science, isn't it?

A. Yes.

Q. And things like – Who is the fellow that developed the law of gravity? Looked up and saw an apple fall out of the tree, and I don't know whether it hit him or not – Isaac Newton. That's a science, isn't it?

A. That's right.

Q. You hold an apple up and let it go, it's how it is going to hit the ground, isn't it?

[2673] A. That's right.

Q. Unless you are up with Sally – Whatever her name is, in that spacecraft, and then that won't happen, will it, but that's still explainable, and that's still a science, isn't it?

A. Yes.

Q. And there is a 100 percent predictability in that science, isn't there?

A. Not quite, but it's close to that.

Q. It's close to that.

But two and two always makes four?

A. That's right.

Q. And four and four always makes eight, don't they?

A. There is argument on that. But I would say,

yes.

Q. But I suppose if Don Nugent and I were talking about it, there may be an argument, but generally, everybody agrees it is a science, two and two are four, and four and four are eight, right, and so forth?

A. Yes.

Q Two and two isn't always four in psychiatry, is it, Doctor?

A. That's right.

Q. And there are different schools of thought, aren't there, Doctor?

A. There are, yes.

[2674] Q. And there are different philosophies?

A. Yes.

Q. And there are different theories?

A. Yes.

Q. And can people – let's go back a little bit.

The field of psychiatry, you say, has progressed in the 50 years, or so years that you have been in it, right?

A. Yes, sir.

Q. Tell us a little bit about the history of psychiatry.

How old a combination of art and science is it?

A. In our country probably the first two hospitals still exist in New York and Philadelphia, were built in the latter part of the 18th Century.

Q. What are the names of those hospitals?

A. The one in White Plains, New York, is the branch of hospital of Cornell Medical School.

In Pennsylvania, University of Pennsylvania Medical School.

Q. So they were built some 200 years ago, then?

A. That's right.

Q. You say in the latter part of the 18th Century?

A. That's right.

Q. Just around the time then that we got started as a [2675] country?

A. That's right.

Q. And certainly psychiatry and the art, or the science has progressed since that time, hasn't it?

A. They have to go hand in hand, yes.

Q. And the methods have changed and the philosophies have changed, and the theories have changed, haven't they?

A. But the main goal is the same.

Q. And that is where we come into the art, isn't it?

A. That's right. The application of science brings about art.

Q. The purpose is kind of to either make the patient feel a little bit better or be able to exist in society, or to segregate that person so he can't be a danger to society; isn't that right?

A. Purpose of psychiatry is the treatment of difficulties of the mind. Psyche, and atric, is a Greek term, which is practitioner, or treatment. Our aim is to help the individual to emerge from, or get over the

difficulties which he has caused, or the difficulties which he is suffering, or both.

Q. All right.

A. And I said the other day, and I still believe, there is very little that we can all cure, but we hope [2676] that we can help the individual to emerge from his difficulties.

Q. And in some cases helping someone is being able to return that person to society; isn't that true?

A. That's right.

Q. And in some cases helping that person or helping society is not returning the person to society; and isn't that true?

A. That's a possibility yes.

Q. And there are some people that can't be cured; isn't that true, at least?

A. Can't be helped.

Q. At least –

A. By the methods that we use.

Q. At least with what we know how?

A. Yes.

Q. And again the methods have changed, right?

A. They change and they merge, and what we call eclectic society, is pretty generally what a psychiatrist includes in his treatment; eclectic means to select from all the various theories and methods that may apply to the art of psychiatry best to this person.

Q. There was a doctor here the other day, and he told us about treatment 200 years ago where they

put a patient in a chair, put a hood over his head, and spun [2677] him around in a chair.

You are familiar with that, aren't you?

A. Yes.

Q. And in your thinking today, we would find that to be pretty silly, wouldn't we?

A. Today.

Q. Or pretty ineffective, in any event?

A. Today, yes.

Q. Today. All right.

So the methods have changed, and it is fair to say they will probably continue to change, won't they?

A. I think that's necessary.

Q. Do you think based on your experience and the years that you have been in the profession that maybe 200 years from now people will think what we are doing is silly?

A. I'm sorry, but probably that's what they will think.

Q. But none of us have the ability to look over 200 years as the people 200 years ago who put the hood on the guy and spun him around in the chair, they thought they were doing the best they could and they were doing the best they could at that time, weren't they?

Doctor, does the word Bedlam mean anything to you as a psychiatrist?

[2678] A. Yes, it does. Bedlam is in Bethlehem, England, was pronounced Bedlum, people who were test and were therefore their names were sent there

sometimes by their families and there was no treatment, and the individuals were just kept there and fed, and the noise and the disorganization was so profound that the term, it was bedlum was applied to that.

Q. It became part of your language?

A. Yes.

Q. And the methods certainly changed since that time, haven't they, Doctor?

A. That goes back to the late 16th and early 17th Century.

Q. What we did with people that were test, as you say, was we confined them and they screamed and they hollered and they occasionally began to run, and that was the treatment; is that what it was?

A. Yes.

Q. Now, Doctor, when you take a case as a psychiatrist, what are the things that you do? What are the things that are accepted in the profession?

I'm Joe Blow, I knock on your door, I say Doctor, I would like you to do whatever you do with me. What do you do?

A. Well, first of all, we attempt to bring about some [2679] kind of relationship with a patient. And in that, the history is obtained.

Q. The history?

A. Yes.

Q. For instance, if I came to you and said, "Doctor, I'm a compulsive talker," you would want to find out a little bit about the history, and then you would want to find out why, wouldn't you?

A. If we looked for that, yes.

Q. Tell us what a history is.

A. It is a recall of the important events in individuals lives, as a child, for instance, we would have to get much of it from the parents because the child doesn't remember.

Q. Is the history that you get, the method of preparing that history, that's accepted as the right way to do it in your profession, is that history limited to just what you learned from the patient?

A. No. There are other sources of material.

Q. And what sources do you go to?

A. Family, parents of the child, family, schools. For example, we can get information on the behavior, the accomplishments of the individual. And in a situation like this one we learn what we can from what the Court offers us.

[2680] Q. All right

A. That influences our thinking.

Q. All right.

Now, Doctor, you're alone in your office, aren't you? You're what we would call a sole practitioner?

A. I have a partner who is my son.

Q. I see. And tell us a little bit about the way psychiatrists work. Do you utilize other psychiatrists, perhaps psychologists, perhaps social workers? You told us something the other day about the use of almost a team to do some of the things that you do.

A. Well that would be particularly true in a court situation. The Psychiatric Clinic and the court

maintains professional social workers who are well trained, maintain psychologists, maintain psychiatrists.

Q. Incidentally, have you ever been connected with the courts in any other official capacity?

A. With the Juvenile Court.

Q. When and for how long were you connected?

A. For a little over 25 years. Until 1972 with the Cuyahoga County Juvenile Court.

Q. And what was your function, your job, your duties and responsibilities?

A. We had the chief psychiatrist and we had about eight or ten others that came in part time.

[2681] Q. And that was with our Cuyahoga County Juvenile Court?

A. Yes. Yes.

Q. And you were there for 25 years?

A. Yes.

Q. All right.

Expand, if you will, or tell us a little bit more about the team itself, the people that you talk to, the things that you do to compile a full history on a patient?

A. In referring to a court situation, we always had the probation officer who was responsible for getting the data from various sources. We had psychologists, we had probation chief who supervised the clinical services there, and then we had psychiatrists which offered the judge an evaluation of all of these findings.

Q. All right.

A. With recommendations.

Q. Is it accepted in the profession for a psychiatrist to consult reports made by other psychiatrists? Is that an accepted way –

A. Yes. Yes.

Q. -- of preparing a full history?

A. It can be an advantage.

Q. All right. Is it an accepted way of preparing a [2682] history to read the reports and utilize the reports of psychologists?

A. It's a good advantage if we can get it, yes.

Q. All right.

Let's digress in the field of psychology. Tell the ladies and gentlemen here what a psychologist is?

A. A psychologist has basically the same aims that psychiatrists have except that they are not physicians and they depend a great deal on objective tests or studies.

Q. All right.

And digressing a little bit further. You used the word objective. Look over here and tell the jurors what the word objective means.

A. Well these tests such as, for example, the ink blot test, have had validating authorities reporting on the values of these tests. Rorschach was a psychiatrist who – Swiss psychiatrist – who presented this idea in 1918. But the latest amount of advance has been made by psychologists who have used this in connection with psychiatric studies.

Q. All right.

You told us the other day, and I think we used the example if my arm is hanging in two and you can see the bone sticking out, the objective findings are that I've [2683] got a broken a arm, right?

A. Yes.

Q. All right.

If I stood here and said that my arm hurts, and it hurts an awful lot and the fingers won't move, you could make a subjective evaluation or diagnosis that I might have a broken arm, right?

A. I would make an objective evaluation of this subjective report which would tend to be distorted.

Q. Yeah. But unless the bones are hanging out, the objective way that a medical doctor determines whether or not the arm is broken is to put it under an X-ray or a fluoroscope; is that right?

A. Yes.

Q. All right. And in the field of mental illness, in the field of mental defects, in the area of mental diseases, you can't put one under a microscope, can you, Doctor?

A. You can try, but it's not effective enough.

Q. All right. Unless someone would have a tumor the size of a grapefruit, the X-ray probably wouldn't help it?

A. (nods.)

Q. You did tell us that some of the psychologists tests move from the area of subjective, and subjective proves one's, oh, philosophy and one's, oh, theory to the theory of objective which we can all see.

I think you said that the test – Let me try this again.

The Rorschach?

A. Rorschach.

Q. How am I doing? I'll get that if I keep trying.

Anyway, that test tends to be objective then?

A. Yes.

Q. And there are some other tests that are utilized that tend to be objective?

A. Objective view of subjective responses. These ink blots are – there is a right and a left side, are the same of ten cards. The individual is asked what he sees and what he sees is in his mind because there is no structure to these ink blots. It's like looking at clouds. You see something that only you can see, but the examiner has learned in this period of 65 years what some of these answers might suggest.

Q. All right.

And in proving anything you go from, what, the general to the particular; and in any event in these 65 years we've got some answers and they correspond to that which can be proven then; is that about it?

A. Yes. Probably two equally well-trained [2685] psychologists or psychiatrists, also, there are a few who do this, would agree on the findings.

Q. All right.

So there is some objectivity, there is something that we can see and say he answered this way.

And out here we have some other people that answered this way and we can demonstrate objectively then that there is some validity to that test; is that right?

A. Yes.

Q. Okay. Now since you're here to talk about Frank Spisak, I guess it's time we ask you about Frank Spisak.

When did you first see him, Doctor?

A. I saw him in April twice.

Q. Twice—

A. Twice in April.

Q. All right.

And you saw him how many times total?

A. Five times.

Q. And when is the last time? I know you told us the other day, but we should get that down.

A. The last time was a week or so ago in this area.

Q. Before you testified here?

A. Yes.

Q. Last week?

[2686] A. Yes.

Q. All right.

And how many total hours did you spend with Frank Spisak?

A. I think about ten direct hours with him, yes.

Q. All right. And based on your experience and the way things are done in the profession, did you see Frank Spisak enough to be able to make a diagnosis?

A. Yes. With the help of the reports that I read from the psychiatrists of Common Pleas Court, from

the psychiatrists or psychologists who also examined him, Dr. Althof and Dr. McPherson and also Dr. Bertschinger, I had the opportunity to examine their findings.

Q. All right.

Now did you examine the findings of the other doctors before you went to talk to Frank Spisak or in between visits or afterwards or tell us what you did there when you were putting together the history?

A. Most of the first – I saw the reports by Dr. Resnick --

Q. All right.

Now stop there and tell us who Dr. Resnick is, if you will?

A. Dr. Resnick is the chief psychiatrist of the Common Pleas Court System. I think that's his title.

[2687] Q. All right.

Do you know Dr. Resnick?

A. I've met him.

Q. And he's well respected in his profession, isn't he?

A. Very.

Q. And he's well respected even beyond the boundaries of Cuyahoga County and the State of Ohio, isn't he?

A. I would say so, yes.

Q. And he's a psychiatrist, isn't he?

A. Yes.

Q. And a very able psychiatrist?

A. Yes.

Q. All right.

Did Dr. Resnick prepare a report?

A. Yes.

Q. And was it a very long, detailed report or was it brief?

A. There was a description of the various contacts that he had with Mr. Spisak and an explanation of his findings as to what they meant to him.

Q. And there was a history related to the events involving the killing that Frank Spisak did, weren't there?

A. Yes.

[2688] Q. And the entire report was 20 some pages or so, wasn't it?

A. There were two reports and of all the various reports, I don't remember, but there were quite a few –

Q. In other words –

A. -- pages.

Q. Would you say that Dr. Resnick's report was very thorough?

A. Yes.

Q. Would you say that Dr. Resnick's report was very detailed?

A. Very?

Q. Detailed.

A. Yes.

Q. And using Dr. Resnick's report, that's an

accepted method of psychiatry, isn't it?

A. Yes.

Q. All right.

You'd be remiss if you didn't read it, wouldn't you?

A. That's right.

Q. And did you read that before you talked to Frank Spisak?

A. I did read his, yes.

Q. All right.

[2689] And did Dr. Resnick, in making his report, did he do what you did then in diagnosing Frank Spisak? Did he use other psychiatrists or other social workers or other psychologists as a basis for his report?

A. I have to assume that he did, although he didn't mention that in his report to the court. I assume it because one psychologist, Dr. Althof, I think was engaged by him to do a study.

Q. All right.

Now did you read Dr. Althof – and that's A-l—

A. I didn't read it until much later.

Q. Until much later, but as part of the things that you did to arrive at the ultimate diagnosis; you did read his report?

A. Yes.

Q. And Dr. Althof is who, sir?

A. I don't know enough about his credentials, but I know of his standing.

Q. All right.

A. We don't have as much contact with the profession of psychology.

Q. He is a psychologist then?

A. Yes. Yes.

Q. All right.

And as far as you know is he a respected man in [2690] the field?

A. Yes.

Q. And he made up a report, didn't he?

A. Yes, he did.

Q. And he administered some tests, didn't he?

A. Yes.

Q. And were those tests and the results made available to you?

A. Yes. The written report, yes.

Q. What were the tests that he did?

A. I could name them, but the Minnesota Multiphasic examination was one, the Rorschach was another, and these are the two that are more significant to me than the others that were given.

Q. All right.

Now are you schooled or, I suppose the word is competent, to administer and grade, if you will, for lack of a better word, either one of the Minnesota Multiphasic –

A. Well no one has to be skilled to administer the MMPI, the patient does it himself. It's just an inventory of feelings and self-examination.

Q. As a matter of fact that test, to grade it, a psychologist was in here the other day and told us that he used some templates that you overlay on it or you can [2691] feed that into a computer; the yes and no – what is it, true and false or yes and no?

A. You don't always have that. It depends on whether you give a full one or a long one.

Q. In this case do you know what was given?

A. I didn't see the examination. I saw the report on the examination.

Q. You saw the report and that was Dr. Althof's report on the Minnesota test and on the other one?

A. The other –

Q. The ink blot test?

A. The Rorschach.

Q. That's easier to say than the name of it, isn't it?

In any event, did you read and did you study and did you digest the results of the Minnesota test?

A. I did not.

Q. Well –

A. Just the results.

Q. Just the results.

I mean, you saw the results and were the results, what you saw there, did they play a part, did they assist you in reaching your ultimate diagnosis?

A. Yes.

Q. All right.

[2692] Now the ink blot test you saw the

results there?

A. Yes.

Q. And were those results helpful in arriving at your ultimate diagnosis?

A. Yes.

Q. Okay. Now in addition to Dr. Althof, did you read the report of the diagnosis of any psychologist or psychiatrist?

A. Dr. McPherson, psychologist.

Q. All right.

Tell us who Dr. McPherson is.

A. She's a psychologist about whom I've heard. I don't recall having met her. Her reports were very helpful and much respected.

Q. She's a clinical psychologist then?

A. Yes.

Q. A doctor?

A. Yes, Ph.D.

Q. And she's well respected in the field?

A. I'm satisfied that she is.

Q. All right.

Incidentally, Dr. Markey, did the results of the testing, the ink blot and the Minnesota test administered by Dr. McPherson and by Dr. Althof, did they both come to the same conclusion?

[2693] A. Pretty much. Both of them made the same type of diagnosis that officially is recognized in the past six or seven years by the Psychiatric Association. They agreed on that; however, both of

them indicated some concern about some of the findings. Roughly, for example, Dr. Althof said the this man's difficulties in a mental conflict or confusing situation would be so great that it would be difficult to predict whether he would react in a predictable, acceptable way or in a breakdown. This was what I gathered from Dr. Althof.

Q. All right.

And Dr. Sandra McPherson, what did she say?

A. Dr. McPherson was very much concerned about the responses that included too much, as she said, blood, death, deterioration, sex, indicating that there is conflict or deep confusion, according to the Rorschach examination, in the subject.

Q. All right.

Doctor, let's digress for just a moment. These tests, and we've talked about objective and subjective, what does the word malinger mean?

A. To claim illness or difficulty for which no objective proof can be found.

Q. All right.

And, Doctor, that's always a concern in your [2694] field, isn't it?

A. Much less than I originally expected. It's rare that a true diagnosis of malingering can stand up.

Q. All right.

The tests, the Minnesota test – well let's back up a little bit and ask it this way:

You know I go out and do something and I don't – I get caught red handed and I don't have any other defense and I might just say, well, I'm crazy. And I take one of these tests and I'll write all the

bizarre things I can think of. You've got a way within the test itself, don't you, of saying, you know, this guy's just making that stuff up, he's malingering? You have a quotient or whatever built in there to detect that, don't you?

A. Yes. Yes. But as I said, it's very difficult to reach what is called a proof of malingering. You can say that you believe this individual has been honest in referring to what he says and he, therefore, is not seeking secondary gain because what he wants to tell you is to be for his advantage. And you can so suggest that you believe that his motivation is self-centered.

Q. Of course –

A. But you can't prove it. I can't.

Q. The secondary gain could be translated, if I don't [2695] have any other defense and they've got me red handed, the secondary gain would be for somebody to say, I'm crazy so I don't have to go off to jail or whatever?

A. It's possible, yes.

Q. But you have a way of detecting that, don't you?

A. This represents, again, the art of psychiatry.

Q. All right.

A. Rather than the science of psychiatry.

Q. Sure. And Dr. Althof and Mr. McPherson substantially agreed in their diagnosis?

A. Yes.

Q. And their test results?

A. They agreed with Dr. Resnick in their

diagnosis because they also are using the same kind of diagnostic classification.

Q. I see. And now Dr. Resnick is, I suppose what we would call a State doctor? He's employed by the State of Ohio; isn't that true?

A. I would say that, yes.

Q. And Dr. Althof is a State doctor, he's employed by the State of Ohio, isn't he?

A. It didn't say so in the report, but I'm quite sure that's true.

Q. He's head of our clinic?

A. Yes. Yes.

[2696] Q. And Dr. McPherson, you know, was employed or hired by the defense?

A. Yes.

Q. And they all agreed and you agree with all of them, don't you?

A. My thinking resembles theirs well enough to say I'm well enough impressed with some of their data and I've used it in my reports here.

Q. Now, in addition to Dr. Althof, Dr. Resnick, Dr. McPherson, did you in compiling the history, did you consult the diagnosis of any other doctors?

A. Well Dr. Bertschinger was listed. I don't know whether you asked him, whether the defense asked him. I think he has a position similar to Dr. Resnick in another county.

Q. All right.

And you don't know whether he was hired by the defense or hired by the State of Ohio?

A. I wasn't told.

Q. Doctor, just to clear that up, would it make any difference to a professional man who hired him?

A. I would say no.

Q. All right.

You're a professional man, aren't you, Doctor?

A. Yes.

[2697] Q. And you're hired to make a diagnosis, aren't you, Doctor?

A Yes.

Q. And you're not hired to make any particular diagnosis, are you?

A. That's right.

Q. Um-hum. And the defense hired you in this case, didn't they?

A. Yes.

Q. All right.

Doctor, we didn't say that we're going to pay you an awful lot of money if you find that he's insane; we didn't say that to you, did we, Doctor?

A. (Nods in the negative.)

Q. All right.

And your fee isn't conditioned on your findings, is it, Doctor?

A. (Nods in the negative.)

Q. And you're employed by the defense, aren't you, Doctor?

A. Yes.

Q. And you agree substantially with the State's doctors who are paid by the State?

A. Yes.

Q. And equally they are professionals, aren't they?

[2698] A. Yes.

Q. All right.

One other thing, Doctor.

Would it be important to your diagnosis, would it be important to your testimony whether or not you had talked to me or Jack Gardner or Billy McGinty of anybody else; would that play any part in your diagnosis?

A. I don't think it has. I have met with these people twice and each time it was made clear their concern was to find out what I thought about this man. And I would send a report to them and they could use it according to what they thought – how valuable they thought it was.

Q. All right. And you understand that Billy McGinty and Jack Gardner and I, we're laymen and we don't know an awful lot, if anything at all, about the field of psychiatry?

A. I can't add to the last part. I know that just as I came to court not knowing the law, but appreciating and respecting it, and I'd better, I have to know enough. I would say that some lawyers are better informed than others.

Q. All right.

And we came to you not knowing too much about psychiatry, but respecting and appreciating it and said to you, Doctor, we think this guy is crazy as

can be, [2699] but you're a doctor, you tell us; right?

MR. NUGENT: Objection, Judge.

THE COURT: Overruled.

Q. And you gave us a diagnosis and not necessarily what we wanted to hear; isn't that true?

A. That's right.

Q. And you didn't say, well if I doubled my fee, I could tell you what you wanted to hear; you didn't do that because you're a professional, right?

A. I'm sure of that.

Q. All right.

And you wouldn't fault the defense, would you, Doctor, if we went to a couple of other doctors and got a second or a third or a fourth opinion?

MR. NUGENT: Objection.

THE COURT: Look, ladies and gentlemen, apparently they've made arrangements for you to go to lunch some place, I don't know. And I think the reservations were for 12:30. So we're going to have to break for lunch. I don't know what time you're going to be back, but let's plan on starting at 2:00. If you're a little later, there's not much we can do about it.

Remember all the admonitions I've given you. See you some time around 2:00. Have [2700] a nice lunch.

* * *

(Thereupon the luncheon recess was taken until 2:00 p.m., Monday, July 18, 1983, at which time the following proceedings were had:)

* * *

[2701]

MONDAY AFTERNOON SESSION, JULY 18, 1983

* * *

THE COURT: You may be seated. You may continue with your examination.

MR. SHAUGHNESSY: All right. Thank you, your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. SHAUGHNESSY:

Q. Dr. Markey, when we went to lunch, we were, or before we went to lunch, obviously, we were talking about those things that you did, those other reports that you read and those things that you put together to make up the history of Frank Spisak.

You recall that conversation?

A. Yes.

Q. And you told us that you read the report of Dr. Resnick, Dr. Phillip Resnick?

A. Yes.

Q. And that was helpful to you, wasn't it?

A. Yes.

Q. Doctor, in preparing your history, did you have the opportunity to read any police reports?

A. Yes, I did.

Q. And those police reports, or excerpts from those, [2702] were they contained in Dr. Resnick's reports?

A. No, sir. They were shown to me after I came in court for the first time a week or so ago.

Q. And those were reports that gave details of each individual crime; isn't that true?

A. Yes.

Q. In Dr. Resnick's report, there was considerable detail in that 20 or so pages, and that was just one report, there was considerable detail as to not only Spisak's version of the crime, but the official, or the State's version of the crime?

A. That's right.

Q. All right.

And you read all of those reports?

A. I did.

Q. And you read them more than once, didn't you?

A. I did.

Q. And you read them before you talked to Frank Spisak and then you read them again, after you talked to him, didn't you?

A. Well the so-called official reports or evidence that was noted by some of the staff people here I read last week. That was after I had seen Mr. Spisak five times.

Q. All right.

[2703] Now would there by any advantage or would it enhance or change your opinion if you had another hour to spend with Frank Spisak or another ten hours or another hundred hours or whatever, would that be helpful to you at all, Doctor?

A. I question that. I am not asking for it. I believe I have an opinion now about the total situation.

Q. All right.

And is the spending of ten hours with the patient, the defendant in this case, is the reading the voluminous reports that you read in this case, would that fit into the accepted way that psychiatrists go about and perform their duties in such a case?

A. I would say yes.

Q. You did everything that other psychiatrists would do then and if someone else did it, you'd say that's the proper way to do it, and someone else would probably say you did it the proper way?

A. I would expect that to be so.

Q. All right.

In other words, that's what psychiatrists and psychologists do, they talk to the patients, they read the reports, and so forth?

A. (Nods.)

Q. Now you said that you read Dr. McPherson, the [2704] psychologist and Dr. Althof, the psychologist, and they're both well respected?

A. Yes.

Q. And one is employed by the State and the other is employed by the defense?

A. Yes.

Q. And they substantially agreed, didn't they?

A. Well, their comments were significant with regard to the mental condition of the patient.

Q. The diagnoses that were made by both doctors fairly well dovetailed, didn't it?

A. Yes.

Q. And Dr. Resnick's diagnosis, you and he are very, very close, aren't you, Doctor?

A. Yes.

Q. All right.

And you read Dr. Bertschinger's report?

A. Yes.

Q. All right.

And he's a respected man, isn't he?

A. Yes, he is.

Q. He's a notable and a good psychiatrist?

A. Yes.

Q. And do you agree with him?

A. In the diagnosis?

[2705] Q. Yes, sir.

A. His comments in the face of the diagnosis are worth repeating.

Q. All right.

What did he say that you particularly agree with?

A. He thought that the traits, the conduct and the traits of the patient were out of keeping with the ordinary degree of difficulty that would fit the typical diagnosis of schizotypal personality disorder. He made a comment that these traits suggested to him some degree of mental illness.

Q. All right.

And do you agree that Frank Spisak has some degree of mental illness?

A. If I may elaborate, I can answer that in a

moment or two.

Q. Please do, Doctor.

A. The diagnosis itself is a relatively new diagnosis. The diagnosis of pesonality disorder prior to seven or eight years ago would have included reference to this as either the first stage before a psychotic illness or that it might be part of an eventual psychotic illness or even that it could have succeeded a psychotic illness.

Q. Just let me lead you into another direction, if I [2706] might.

Doctor, I suppose you ought to tell us, first, what is a psychotic illness?

A. Characterized by a disorder of thought in which the individual may be diluted, may hallucinate, may be disoriented as to person, time, identity, and obviously so. And is unable to operate in a society in which ordinary judgment is expected.

Q. Now, so that we are clear, Doctor, does Frank Spisak have such an illness or such a condition as you just described?

A. The reason that I prefer to think that is, that in his thinking he is convinced that he is right. He is convinced that what he has done was in the direction of his beliefs, including evil forces in our society such as perhaps, blacks and Jews, and perverts and quote, the system, unquote. The system being the government which may dispose of him as it chooses. His concept then of being a citizen is in my view abnormal.

Q. Now, Dr. Markey, tell the ladies and gentlemen here, if you will, if based on your professional experience, based on those things that you have read, based on the hours that you spent

with Frank Spisak, do you have an opinion as to how long the condition that you have described existed?

[2707] A. I would say no. I think this is a fairly fixed attitude, which appears not to be responsive to what we call psychotherapy. It appears not to be responsive to any method of treatment, which might be used, let's assume, in institutions.

We have tried over the years with this type of personality disorder to deal with the individual and found the outlook is guarded, at best.

Q. Doctor, I kind of wanted you to tell us with Frank Spisak the condition that you described, how far back in his lifetime does it go?

A On the basis of the social history of Mr. Walinger, for example, I learned that he had difficulty as a member of his family, that he had difficulty as a member of his classes at high school, because they made fun of him, made fun of him particularly because of his political views.

I also learned in that history that there were actions taken by him which suggest, for example, that he was unsure of himself in terms of his gender identity. At one time he was considering a sex change in gender. This is a very difficult and very important condition which we haven't been able to classify finally yet, but has been shown respect and study by various branches of medicine.

[2708] I would say that he tries this, and it is a very long and difficult road to take, and then he decided to stop.

I also learned from the history that was gathered from the records that were shown me that he had in the past been involved in difficulties, sexually, with people of the opposite sex, as well as

that in one mention made, and I think this was in Dr. McPherson's, that he would have difficulty with women at the same time that he would also identify with them. And this is a type of mental conflict that represents an explosive potential.

Q. Now, Doctor, in your opinion is Frank Spisak, is he mentally sick?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q. Doctor, in your opinion based no your background, your more than 50 years in the profession, can you tell us whether at the time of committing these offenses Frank Spisak, because of a mental disease or defect lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law?

A. I think he knew that what he was doing was against the law. I think he also believed that what he was [2709] doing was the right thing. And he was able to control his actions as he may very well have from time to time, but he didn't control his actions in the five instances, I think it was five instances, in which he was charged.

Q. Doctor, again almost the same question, but cutting it in half; does Frank Spisak have a mental disease or a mental defect?

A. There is no –

Q. In your opinion.

A. Pardon?

Q. In your opinion.

A. I would say that he is mentally unwell, because the possibility of an explosive reaction, as I

mentioned I think the last time I was here, remains, but it hasn't occurred.

Q. Well, now, Doctor, you say that it hasn't occurred. Address yourself, if you will, sir, to the five separate instances that we all know about. Those were explosive, weren't they?

A. I would say so.

Q. The mental condition, whatever it might been at the time, was that disease or defective?

MR. NUGENT: Objection.

THE COURT: What? Can you repeat that question, Mr. Shaughnessy?

[2710] MR. SHAUGHNESSY: Sure.

THE COURT: Put another question.

MR. SHAUGHNESSY: All right.

Q. Doctor, obviously, the conduct existed by Spisak at the time that these five things happened was certainly reprehensible, was certainly explosive, no question about that?

A. That's right.

Q. Let's start back, again. You say that he is not well.

Let me ask you again, does he have a mental disease or a mental defect?

A. I'm trying to identify myself as a psychiatrist in a courtroom, and I find that difficult. I know that from the standpoint of DSM3, diagnostic procedure, I have to say that he was not insane at the time that he acted the way that he did.

Q. Maybe we can work it one word at a time.

As a medical man lean over and tell the jurors what the word disease means.

A. Disease in terms of the knowledge classification has to be defined specifically. I would say there is no specific diagnosis of mental illness that was present at that time when I examined him.

[2711] Q. Well first let's just get some fundamentals.

What does the word disease mean?

A. Disease means discomfort as a result of inner or outer pressures which the individual is unable to tolerate.

Q. Not just in the sense of psychiatric, but in the broad definition of the way, disease as it applies to the medical profession.

What does the word disease mean?

A. A specific disease might, for example, be paranoid schizophrenia. I can't make such a diagnosis at this time in this case.

Q. Fine. Doctor --

A. That would come closer --

Q. Is the common cold a disease?

A. Yes.

Q. All right.

Is the common cold a forerunner or part of, for instance, pneumonia?

A. It may be.

Q. All right.

Is the schizotypal personality, is that a disease?

A. No.

Q. Is that an illness?

A. In lay terms, it is an illness.

[2712] Q. In lay terms –

A. In psychiatric terms, it is a personality disorder. His nature is odd and strange. He believes, for example, that whether or not he had talked originally with me about these five instances which he kept from me until last week, it would have made no difference anyway because the system was going to take care of him and he had views of his own of the law which he believes, I'm sure, is sound in which he could indict, convict and execute the enemy.

Q. And did he think he was right?

A. Yes.

Q. We talked about the word malinger this morning and you told us what that was, didn't you, Doctor? You told us what malinger was?

A. (Nods.)

Q. Is it possible or be probable or is it unlikely that he was malingering in this case?

A. It is unlikely. He has been – he was utterly clear and openly without apparent guardedness when he talked with the examiners before he saw me. I would say that by that time he had a change in his mind and his thinking that he chose not to talk to me about.

Q. And, again, do you agree with Dr. Resnick and Dr. Althof and Dr. McPherson and Dr. Bertschinger; is that [2713] right?

A. Yes.

Q. All right.

And the odds aren't very good that he could fool all of those doctors, are they?

A. I agree.

Q. And this malingering well that you gentlemen in your profession call malingering, you have ways of detecting that, don't you?

A. Well we may detect or suspect malingering and yet not be able to explain or do anything about it.

For example in the early years of the first world war, when anybody complained that he couldn't hear, they learned, the examining doctors at that time, learned to examine a person in a room where the floor was concrete. And the doctor would then drop a silver dollar and the patient would say, oh, what's that, indicating that he could hear. But that doesn't really explain the nature of malingering. That just presents it as a problem.

Q. All right.

And, of course, in the field of psychiatry, Doctor, you can't drop a silver dollar and get an objective response, you have to do some other things, don't you?

A. Yes.

[2714] Q. What other things do you do, Doctor, to detect and toss out malingering or exclude it from your diagnosis?

A. I must admit that I have never made a diagnosis of malingering. I have suspected it many times, but I've never made it. I think it's exceedingly difficult to make a diagnosis.

Q. All right.

Do you suspect malingering in this case?

A. No.

Q. And you mentioned a minute ago, reading Mr. Walinger's report, the social worker, the State social worker –

A. Yes.

Q. And that was helpful to you, wasn't it?

A. Yes.

Q. And Mr. Walinger did a good job, didn't he?

A. Yes.

Q. And he's a respected social worker, isn't he?

A. Yes.

Q. And you agree with Mr. Walinger, don't you?

A. Well, I draw conclusions from it that are very much like the ones that he did, although he does not draw conclusions he offers his materials to the chief psychiatrist who used it just as I used it.

Q. And four doctors and yourself have pretty well [2715] agreed on those conclusions?

A. Yes.

Q. And the conclusions, the conclusions are that Frank Spisak is sick; isn't that right?

MR. NUGENT: Objection.

THE COURT: Objection sustained.

Q. If we can go back to that fancy question that I had to write out so that I'd know what it was, and I don't think we really got an answer, Doctor.

Tell us again, based on your professional

experience whether at the time of committing the offense Frank Spisak, because of a mental disorder or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law?

A. Well, I think he lacks substantial appreciation of the meaning of his attitude towards society's rules. I think he knew that. Could he have – could this have kept him from doing it? No.

He believes in the law which he himself has set up for himself. He has lacking for it in his view with people such as, for example, people who have never died – who have just left their bodily existence and he appears to feel that this can happen to him, too.

[2716] MR. SHAUGHNESSY: Excuse me just a minute.

Q. Doctor, you made a report, didn't you, and as a matter of fact we showed you the report the other day, didn't we? Do you recall that? You made a report after you made a report to us, you told us what your diagnosis was?

A. Yes. On June 17th, I think.

Q. We talked about that when you were here last week and I'll get it in a minute, but we don't have it right here.

And the report that you made and you say the date was June 17th?

A. I may have it here.

Q. You may have it there, all right. Why don't you take a minute and look through your things there and see if you have it.

A. These are in my handwriting. I don't have the

original –

Q. Well let me see it and we can do this together. We'll get the one that's been marked in a minute.

Doctor, I have my copy that I've scribbled all over Page 3, and without marking it, for the purposes of the record, this is a copy of what we had here the other [2717] day, isn't it?

A. You want me to read this out --

Q. Well first tell us this is a copy that you think that you gave me, isn't it?

A. Yes.

Q. All right.

Now with this paragraph, almost the last one, substantially the last paragraph, is this your conclusion or diagnosis, doctor, where you say "I believe Spisak is in a latent--"

A. Psychosis.

Q. "—psychosis." And then in brackets you said, "Grandiose, paranoid, lacking in finer feelings, etc." And then you closed the brackets. You said that, didn't you, Doctor?

A. Yes, I did.

Q. That's still your opinion?

A. Yes. Yes.

Q. And you go on to say, "He was unable to control his impulse to assault though he was at the time aware of it being socially wrong."

A. Yes.

Q. You said that in your June 17th report, didn't you?

A. Yes.

[2718] Q. And that's still your opinion, isn't it, Doctor?

A. If you go further, it says, "These impulses--"

Q. All right. Let's do that together.

"These impulses have been chronically present for years, at least from the onset of puberty."

A. That's right.

Q. And you still believe that, don't you, Doctor?

A. Yes.

Q. Still your opinion, is it?

A. Yes.

Q. And you go on to say, "The psychological protocol especially in the –

A. Rorschach –

Q. Thank you, sir.

"—responses suggest an underlying psychotic potential"?

A. That's right.

Q. All right. And that's still your opinion, isn't it?

A. Yes.

Q. All right.

Now, Doctor, do you recall when the defense lawyers in this case first came to you? Do you recall about when it was, just approximate, if you will?

A. I think I can tell you.

[2719] Q. All right.

A. I think late in April I prepared a preliminary

report which I discussed with some members of your staff.

Q. All right.

And, Doctor, you understood when the lawyers, the defense lawyers, came to you that none of them were psychiatrists or none of them knew very much at all about the field of psychiatry. You knew that, didn't you?

A. I can't – I knew none of them was a psychiatrist.

Q. All right.

And you and I had some conversations, didn't we, Doctor?

A. Yes.

Q. All right.

And I kind of told you, didn't I, that, you know, we all think the guy's a nut, but you're the expert and you tell us?

A. Something like that, yes.

Q. Something like that.

And we didn't use those nice words that you psychiatrists use about psychotypal and psychosis, we just kind of said he was a nut, didn't we?

Is that right?

[2720] A. Well I think that you carried the impression that there was something mentally wrong with this man.

Q. Sure. And you think there is, don't you? You agree with that, don't you, Doctor, that there is something mentally wrong?

A. I think that the diagnosis of a conduct or a personality disorder is generally of a type which is called odd or strange is an indication to me as a psychiatrist of something that is mentally wrong. But the diagnosis protects these people from the diagnosis of the last seven years or eight years.

[2721] Q. Seven or eight years ago he would have been in a different category, although his condition wouldn't be any different?

A. The nature of diagnosis must have been slightly different in the sense that we might have said that he may be in a prodromal schizophrenic psychosis. That doesn't go any more. And I have to live with the diagnosis which the American Psychiatric Association and even the international groups have accepted.

Q. But – sure, Doctor.

And no matter how times have changed, no matter how we label it or what ribbon we put on it or what rubber stamp we put on it, we still have a guy that thought it was good to kill a 17-year-old black boy, we still have that same condition, don't we?

A. Yes.

Q. And we still have a guy who will take the witness stand and tell us about that, you got to get them when they are young, we still have that same condition no matter how we label it?

A. Yes.

Q. That's kind of sick, isn't it, Doctor?

A. It's a reflection on us in psychiatry that we are trying to differentiate with our understanding of these people and still haven't come to what you might call a [2722] clear conclusion.

Q. Do you think he really is sincere in his belief that you have got to get these black people when they are young?

A. I think so, yes.

Q. And do you think he is sincere in his feeling that you have got to get them when their defenses are down?

A. I don't know whether that was brought to my attention before, but I would say, yes. I think he knows how to maneuver as I may have brought out last week. I noted that he lacks what I call the finer feelings, or the nuances of feelings. He is governed by fear. He is governed by anger. He is governed by circumstance but not by remorse, not by tenderness, not by finer feelings of modesty. In my examinations, and reading of the records. This is why I think he is still in danger of this kind of makeup that he has.

Q. And Dr. Bertschinger agrees with you, doesn't he?

A. Appears to.

Q. And Dr. Resnick agrees with you, doesn't he?

A. Dr. Resnick's diagnosis was made earlier before I was called. And I think that at the time when Mr. Spisak talked so freely, and so candidly and so comfortably about what he had done, that Dr. Resnick, I [2723] believe, was right in assuming that this man knew what he was doing, and that it was essentially a personality disorder, and he didn't take such notice of the possibility that I did later, and after reading some of the reports of one of the psychologists and another psychologist.

Q. Did Dr. Resnick label him as you did and Dr. Bertschinger did as a schizotypal?

A. Schizotypal, yes.

Q. He labeled him the same way you did?

A. Yes.

Q. So in that sense you and Dr. Resnick, who is a respected psychiatrist, you agree, don't you?

A. Yes.

Q. You use the word remorse. Doctor, we probably all know what that means, but in the clinical sense or the psychiatric sense, tell the jurors what you mean by remorse.

A. He is just not sorry. He is not apologizing for what he did.

Q. Does he have the capacity, the ability, whatever it takes to put your hat in your hand and say, gee, I'm sorry I did that, does he have that ability?

A. I don't think so.

Q. Will he ever have that ability?

[2724] A. It is unlikely.

Q. Whatever he has and however you label him, is he ever going to get well? Is he ever going to get any better?

A. The outlook is guarded at best, I would say I doubt it.

Q. And when you gentlemen in the medical profession say guarded, kind of means what the lawyers say when they say you ain't got a prayer, right?

A. As a physician I have no right to say that a person is sure to die, even though I believe it. I could say I expect him to die. I wouldn't expect him to get

over this, but he might, because he is still alive.

Q. But if he has measles, you could say as a medical man that two weeks from now the red bumps are going to go away, he won't have measles anymore, based on –

A. Yes. I would say he is likely to be well unless, let's say, on the 5th or 7th day a case of pneumonia comes in. Those things we as physicians may know about, but there are many things we still don't know. We are human like you are.

Q. But when you use the word guarded, you wouldn't bet your money on it, would you, Doctor?

A. That's right.

Q. Now, Doctor, when the defense lawyers came to you [2725] and when you wrote your reports on June –

A. 17th.

Q. 17th, you were concerned with sanity or insanity at the time of the offense; isn't that true?

A. Yes.

Q. And do you know the nature of the hearing you are now testifying in? Do you know where we are in trial?

A. Well, I understand from what I was interested in reading in the newspaper that a conclusion had been reached.

Q. As to –

A. If that's what you mean.

Q. There is no question as to the guilt portion, so that the question of insanity at the time of the act is moot?

A. Is what?

Q. It is over with, it is moot?

A. Yes. Yes.

Q. And when the defense sought you out, we asked you if he was insane at the time of the act, didn't we?

A. When?

Q. When we sought you out, Doctor?

A. Yes.

Q. When we came to you back in April?

A. Yes.

[2726] Q. We asked you if he was insane at the time of the act, didn't we?

A. After I had seen him?

Q. Well, when we first came to you, that was the –

A. I'm sure.

Q. That was the reason we wanted you to examine Frank Spisak, wasn't it?

A. My understanding is clear that what you asked me to do was to examine him and offer you my opinion.

Q. Sure.

A. I don't remember whether the issue was a question of whether he was sane or insane.

Q. We didn't offer you one fee if you found him insane at the time of the act and another fee if you didn't, did we?

A. No, you didn't.

Q. We told you you are the professional and you give us, not the diagnosis necessarily we want to hear, what we think it should be, but what it is, right?

A. I think that was clearly stated.

Q. Sure.

And you did all the things that a professional [2727] should do, and you gave us that diagnosis, didn't you?

A. That's right.

Q. Now, do you understand the nature, and it is, again, I think you said it very well before, that about your understanding of the law and my understanding of psychiatry, do you understand what we are doing here now?

A. I believe so.

Q. And what is that, Doctor?

A. That the reason for my coming here is to, perhaps, offer an opportunity which at the previous session that I had may not have been available, namely, what do I think of this person even now as a result of his having been found guilty of these acts.

Q. Now, you know that we offered your testimony a week ago or ten days ago, in an attempt to show sanity or insanity at the time of the act? We talked about that, didn't we?

A. Yes.

Q. And the report that you made, the inability to control his impulse to assault, we talked about that, didn't we?

A. Last time?

Q. Yes.

A. Yes.

[2728] Q. And you understand that that wasn't enough to meet the legal test of insanity? You understand that, don't you?

A. That's right.

Q. Do you understand that the test in this mitigation hearing to be applied is a lot different test?

A. I don't understand your last comment.

Q. All right.

Remember, we talked about the cold being an illness, and it isn't as big as illness or as great an illness, whatever as pneumonia, but is it kind of a forerunner, or part of pneumonia, isn't it?

A. Yes.

Q. And Frank Spisak isn't insane enough to have that as a legal defense, you understand that, don't you?

A. Yes. That's right.

Q. But you understand that that – this hearing is to determine if he is insane enough to mitigate?

MR. NUGENT: Objection, Judge.

THE COURT: Is that your understanding, Doctor?

THE WITNESS: You are asking me to offer an opinion as to whether knowing him to be a mental unhealthy person that he – that there should be some mitigation with regard to what the [2729] Court decides? Is that what you mean?

Q. That's about it, Doctor.

A. That should be given consideration.

THE COURT: Okay. Let's stop. Put another question to him.

Q. But I suppose what I was trying to get to, the opinion that you gave back on June 17th, was an opinion as to the question of insanity at the time of the act, and you didn't, you didn't make a new examination, and you didn't go through all of the things that you did back in April to prepare for this hearing, did you?

A. That's right.

Q. But your diagnosis, your diagnosis that Spisak is a latent psychotic, grandiose, paranoid, lacking in finer feelings, that condition existed in April and as far as you know it exists now, doesn't it?

A. Yes.

Q. As far as you know, it's never going to get any better because the condition is guarded?

A. It's unlikely to get better, and also I wasn't ready in April to make a diagnosis. I saw him again in June twice and then I was.

Q. And the word, Doctor, latent, what does the word latent mean?

A. The potential already exists. It could be, for [2730] instance, in other medical problems, when incubation has set in, there is an infection, and for two or three or seven or fourteen days before mumps come, the individual swells, but the disease is already in process.

Q. But in that incubation period, the man has mumps, doesn't he, Doctor?

A. But we know more specifically that mumps is going to occur.

Q. Doctor –

A. We don't know that in this kind of condition in the same way.

Q. We are just no talking about the word latent. If I put my four fingers on the piece of wood here, in front of you, and I take it up, I have left my fingerprints there, haven't I?

A. That's if we examine we would find them.

Q. But you can't se them, can you?

A. That's right.

Q. Because they are latent, aren't they? But if we put some powder or something on it, they would become patent or obvious?

A. Yes.

Q. And if I put my finger on this chrome, or piece of silver, whatever it is, over here, and you turned that to the light the right way, you can see my fingerprints [2731] on there, right? Can't you?

A. Probably.

Q. So they are latent if they are here, and they are patent if they are here, over here, but the fingerprints exist in both places, don't they, Doctor?

A. Yes.

Q. And if I have diabetes, and it is, of course, something like that, and it is latent, and the signs aren't all there, I am still a diabetic, aren't I, just because the symptoms are being suppressed and you medical men would say, well, he is a latent diabetic, isn't that what you would say?

A. That could be, but I don't think that has to be the term that is used there. He is suspected.

Q. You use the term suspected. Well, we know from what we read in the newspaper, anyway, this new fancy disease that they call herpes, that's not suppressed very often, but if one has it, we are told that one never gets rid of it, and there are stages of remission, you still have it even in the stages of remission, don't you?

A. Still they have it, did you say?

Q. You still have it?

A. Yes.

Q. Even though it is latent, Doctor, you still have [2732] it, don't you?

A. We don't know enough about latency to say that in this given individual what is latent will turn out to be patent. For example, fortunately today, the most powerful disease that we had was syphillis. There were three stages in syphillis, the first stage and the second stage and the third stage. The third stage might not come for 20 to 40 years afterwards. It might never come. Therefore, it becomes latent. Therefore, it might. What I'm saying here is if I were to talk about a dozen or 20 or a hundred people I would be concerned about, the possibility of what could happen here to Mr. Spisak, but that doesn't mean that it is gong to happen, that's why I call it latent.

Q. At the time that Reverend Rickerson was shot and killed, back in February, at the time that Mr. Hardaway was shot and nearly killed, at the time Coletta Dartt was shot at, at the time Mr. Sheehan was killed, at the time Brian Warford was killed, was the psychosis latent at that time?

A. Yes.

Q. Was the psychosis there at that time?

A. I don't know.

Q. Was there anything mentally wrong with Spisak at that time?

[2733] A. Yes.

Q. What was wrong with him, Doctor?

A. He did what is against the law. He knew he was doing it, but as far as he was concerned, he believed he was right to do it.

Q. And is that why you said he was unable to control his impulse to assault, though he was at the time aware of it being socially wrong?

A. I think that's compatible with what I said, namely, that inasmuch as he believed that what he was doing was in a sense as a soldier in a war against quote, the system, unquote, and I have named some of the things that he is against, some of the groups that he is against, and some of the internal difficulties, such as his psychosexual identity, he was confused about that, and I suspect that he still is.

Q. This Naziism that he has told us about, that he has told us in every disgusting detail, is he sincere about that?

A. I don't know. I believe so. I have answered it in the latter way before.

Q. From what you know, from going through all of the social workers, and psychiatrists and psychologists, does this Naziism go back a number of years, or is it something that he made up so that he will not be [2734] electrocuted?

A. No, I think that was there for a long time. I think that it was there when he was teased and bothered as a young man around the age of puberty or early teens, and he was rejected and he was very angry at those people because they believed in what we call the system.

Q. Now, Doctor, everyone as a youngster at some time is teased and bothered. That's part of growing up, isn't it?

A. Yes.

Q. Most of us are able to handle that, aren't we, Doctor?

A. Yes.

Q. Was Frank Spisak able to handle that?

A. I think not.

Q. Why not, Doctor. Why couldn't he handle it and maybe you and I and the folks –

A. Well, you are asking a question as a psychiatrist I wish I could answer. I can't. I don't think we know enough about what causes psychosis. We know about a lot of factors that appear to cause it; I'm not sure of them. There are a few that we know, psychosis, that are caused by specifics; like certain types of brain tumor, certain types of illnesses like syphilis, for example, but in his case I can't say I know.

[2735] Q. Let's go back to the time you and everyone else agrees at the onset of puberty, or at about that time he couldn't handle the rejection?

A. That's right.

Q. Most of us, I'm sorry if I'm repetitious, but most of us can do, at least to a great extent, handle

the rejection, we get around it in socially acceptable ways, would you agree?

A. Most of us, yes.

Q. Is it your opinion, Doctor, that Frank Spisak didn't handle that rejection as a youngster in a socially acceptable way?

A. Yes, that's my opinion. He was unable to.

Q. He was unable to. There was something here then that made him unable to do what all of the rest of us did, maybe with a few fears, but we did it, right?

A. He was unable to deal with the conflict that is normal in adolescence. So that he was unable to grow through that phase into what I call a good attitude towards sharing responsibilities, as well as privileges. I don't think he knew how to do that. I don't think he was able to.

Q. And this ability to share or the lack of that ability, does that equate to the lack of remorse that you told us about?

[2736] A. Yes.

Q. All right. He has an ability to feel remorse. Does he then have an inability to share whatever that means?

A. I think it's a reasonable conclusion to reach, but I haven't investigated that.

Q. All right.

Now he was unable then at the onset of puberty to handle the rejection, he turned to the Nazi Party?

A. May not have been that simple, but I think it's a reasonable progression.

Q. All right.

Now you used the word progression, Doctor. Progression implied within that or implicit within that are some steps, how many I don't know.

What was the progression that led him from being rejected, not able to handle it to the belief in Naziism?

A. Around the time of puberty the individual can't go home anymore. He has to find his own future. That's a very great difficulty. Adolescence is too long. It's the price of civilization, I think. I don't believe in the nature of his relationships at home, and that goes before puberty, that he learned how to, shall I say, get along with his parents, with his two collaterals, two [2737] other children in the family; and therefore, he was not well prepared for the underlying emotional turmoil that normally develops around puberty in both sexes, in mammals. He wasn't prepared.

Q. All right.

A. He didn't go through what we call a latency period, by the way, from 6 to 12 that everybody is preparing to become. A boy is preparing to become a man without realizing it, but after he reaches puberty, he has to realize it. If he doesn't know how to be a successful boy, he'll have great difficulty being a successful youth. This is theoretical.

Q. Because you say at puberty you can't go back home anymore?

A. That's right.

Q. And Spisak could not handle the not being able to go back home?

A. Well, he didn't have a home to go back to

because he had great difficulty living in it.

Q. All right.

A. But he had to go on with the development of puberty because nature insists on it.

Q. All right.

Now, Doctor, just not being able to get along and maybe not being able to share, that's not in and of [2738] itself a mental disease, is it?

A. No.

Q. All right.

A. No. It can be, but it doesn't have to be because we all have that problem.

Q. Sure.

A. Everybody here fortunately may have forgotten about it, but everybody has had going up troubles.

Q. Sure. So simply having growing up troubles in and of itself is not a mental disease?

A. That's right.

Q. All right. Were his growing problems inordinate, or did they cross the line from normal to abnormal?

A. I would say that he was poorly prepared to enter adolescence but I can't tell you, I know enough about it, because from the standpoint of the purpose of my being here in court, I needed to have a reasonable amount of time to decide the kind of person I found him to be, rather than I was going to undertake a long study for two or three hundred hours. People have to want to come to me. If they don't come to me because they want to, the likelihood

of it is that I'm not going to help them.

Thus, for instance, in the first session I had [2739] with Mr. Spisak, he stood before me and he said, I don't want to talk to you. He said, I didn't ask for you. Therefore, I could be –

Q. All right.

Do you know what the basis of the rejection was, Dr. Markey?

A. No, but I have a guess.

Q. Tell us what your guess is?

A. We talked enough about this, he wanted to forget about the difficulties that he already confessed and he wanted to go back what I think to him is far more important, namely that this is a very bad world and that he has, in a sense, designated himself as someone who will bring the world back to where it should be.

Q. All right.

Is he sincere in that belief?

A. I think so.

Q. Now, Doctor, you've told us that – about psychiatry in general and you've used the expression helping and, of course, you take an oath, you take an oath early in your career, took an oath, to help. But in this particular case and in this kind of a case you are not hired or you are not – you don't do what you do particularly to help the patient, but to be able to tell others what his condition is; isn't that true, Doctor?

[2740] A. I don't think so. I was engaged to help this man. I have concluded that I couldn't help him, that I haven't been able to help him. He needs what

he considers support and if he doesn't' get support, then I'm against him. That doesn't mean that he may think this way, but a person who wants to come to a psychiatrist has a chance of being helped. People who come to a psychiatrist to be supported will be disappointed.

Q. Certainly.

A. Because he doesn't decide or advise for them.

Q. Because you're not going to tell him that Hitler was a good man and that six million Jews didn't die in Bertschinger and the other camps; you're not going to agree with those.

A. I don't have to. Empathy is something that a psychiatrist is supposed to have. Sympathy is something that he better not have.

Q. And with Frank if you didn't agree with his premises, he would disagree with you then and you couldn't help him?

A. That's all right with me if he disagrees with me, I don't have to agree with him.

Q. In any event, you have told us about the progression from not being able to handle puberty to the [2741] embracing of Naziism or those concepts.

A psychiatrist, Doctor, why would someone go from having heroes such as Babe Ruth or Lou Gerrig to something like Adolf Hitler? Is there something wrong with that person's makeup?

A. I guess so. It happens you're talking about our society. I would say that chances are very good that he was less than conscious of the fact that he was already involved against society because he was already involved against his own family.

Q. All right.

A. And they against him.

Q. There was something wrong with him even then?

A. I would say so, yes.

Q. And there has been something wrong with him in the intervening years; hasn't there been?

A. In which – intervening?

Q. In the years between then and now?

A. Well it's a great disadvantage to him inasmuch as the function of parents is to help children to get along in the world to which they brought them. And if parents can't do it, that doesn't mean they're bad parents, they're just not wise enough and they may not have been wise enough to understand this boy who was becoming a man.

[2742] Q. So we're certainly not blaming the parents or the sisters, are we?

A. No.

Q. All right.

And the word defect or defective, is Frank Spisak defective?

A. The term that is used by psychiatrists, I would say no. Defect means that you were born without something you needed. I don't think that's true of him. I think he probably was born with a healthy body.

I believe that on the test results, for example, which Mr. McPherson revealed, he was amazingly consistent in all of his learning potential, so she was aware of all the things that were going on that he didn't like and he was aware of the differences between him and those who didn't agree with him. I

would say that a defect would be different, for instance from a dimentia. Dimentia means if you were born with a good mind you have a good mentation. I don't believe this is a result of something that he lost, but something he was never really able to develop. He's not feeble-minded, it's not a term I would apply to him.

Q. No question then that he's not feeble-minded, but it was something that he was never able to develop?

[2743] A. Nearer that, yes.

Q. Fine. And in nature, if it's plant life or animal life or human life, if you plant 1,000 saplings one isn't going to grow at all, at least, right?

A. If you plant 1,000 –

Q. If you planted saplings, small trees –

A. Yes.

Q. -- if you planted 1,000 seeds, some of them are never going to germinate at all and they're going to be defective; isn't that right?

A. That's right.

Q. And some of them are going to germinate, but for some unexplained reason they are going to whither and die; isn't that right?

A. That's right. We can't predict which one will have that trouble.

Q. And the majority are going to be healthy and what we call normal; isn't that right?

A. Yes. Yes.

Q. And in animal life there is a runt in every litter; isn't there?

A. Right.

Q. And there is the pup that doesn't make it and there is the pup that does, and then later on for some strange reason doesn't make it; isn't that right?

[2744] A. Yes.

Q. And with human life we have the retarded or the defective from the beginning, don't we? Is that right?

A. Pretty generally.

Q. All right.

A. Just like before I say four and four might not always be eight. I would say, yes, that most feeble-mindedness or intellectual defect or limited ability to learn is there from the beginning. But we've also learned in my time that some of these can be cured because they were due to something that wasn't offered them before they were born. Now we can do it and many of these people have turned out to be adequate. Maybe we can have some hope in the future that something else will happen even to people who have problems like Mr. Spisak.

Q. You said the problems that he has?

A. Yes.

Q. And he has problems?

A. Yes. Yes, he does.

Q. And they're serious problems?

A. Very severe problems for him.

Q. A very severe problem?

A. Yes.

Q. And though he has severe problems regardless

of [2745] what the jurors or the judge might do, independent of that and within himself he has severe problems?

A. I think so.

Q. Doesn't he?

A. Yes.

Q. And he has, though not a defective, but a rather good mind, doesn't he?

A. You'll have to repeat that.

Q. He has a defective – he has a non-defective – in other words, he has a rather good, mechanically working mind in the sense of I.Q. or ability?

A. Yes, he has that.

Q. And you have told us, Doctor, that he knows right from wrong?

A. I believe so.

Q. All right.

But he believes that our wrong is his right, and your opinion is that that belief is sincere?

A. Yes.

Q. That's not just malingering or looking for a way to avoid the unpleasantness of electrocution?

A. Or to avoid an unpleasantness that may result from what he has done.

Q. All right. And he's sincere in his belief in the Nazi Party and that hate-filled concept of Aryan [2746] superiority, whatever that means, he's sincere in that?

A. I think he is.

Q. All right.

And he's unable to control his impulse to assault though he was at the time aware of it being socially wrong; is that right?

A. Yes.

Q. And your opinion is that all of this has been present for a number of years and wasn't made up by his lawyers so that he wouldn't be electrocuted?

A. I think that he has had these beliefs, and he was perfectly willing to stand by them prior to my coming into the picture, too. After he was apprehended, I think he certainly convined Dr. Resnick that he believed exactly what he said and he was sincere, I believe.

Q. Sure. And Dr. Resnick is the state doctor and you agree with Dr. Resnick?

A. Yes. Yes.

MR. SHAUGHNESSY: One minute, if I might, your Honor.

Thank you so much, Dr. Markey.

Your Honor, we have no further questions.

THE COURT: Thank you, Mr. Shaughnessy.

[2747] We're going to take a break at this time, ladies and gentlemen. Remember all the admonitions you've heard throughout the trial.

I'll be back in here, I hope, in a few minutes.

* * *

CLOSING ARGUMENT ON BEHALF OF THE STATE OF OHIO

[2930]

MR. NUGENT: Good evening, ladies and gentlemen.

It has been a long case, and you are now about to hear the last that you are going to hear from the lawyers in this case. And I said to you in opening statement what we are going to prove in this case, and one of the things I told you was that I believe that the evidence would demonstrate to you clearly, concisely and completely that the defendant was not insane at the time he committed the acts for which he was charged.

Your verdict demonstrated that. And the evidence demonstrated that.

And I said it not lightly in my opening statement because at that time there was a plea of not guilty by reason of insanity filed in this case. And that made it incumbent on the defense, if they could, to rebut that presumption of insanity, and as you see, they could not rebut that [2931] assumption because at the beginning of the trial, throughout the trial, until the end of the trial, there was simply no evidence that could be offered that could indicate at the time in question on any one of these acts for which the defendant was charged, and now stands convicted, that due to some mental disease, or defect that he was unable to distinguish between right and wrong, or that he was unable to refrain from the conduct that he began in, and then you returned a verdict of guilty as to the counts, and as to the specifications to the aggravating circumstances.

And then the issue became, do those

aggravating circumstances outweigh any factors in mitigation beyond a reasonable doubt, and what factors in mitigation do you have?

The defendant, the statute says, must go forward with the evidence of mitigation, and they put on three witnesses to establish for your satisfaction that, number one, mitigation exists, that was their purpose. And that was the subject of Mr. Shaughnessy's exhibits, at least some of his exhibits.

[2932] He also chose to comment on a number of other things, one of which is why he did not speak to any witnesses, or why the prosecutor sent his agents out there during the court of his trial to investigate what some witnesses may or may not say because of lack of a report, or why this defendant was referred to by separate and distinct psychiatrists, and a number of psychologists. And I asked those questions for a very good reason, because the defense of not guilty by reason of insanity was filed in this case in the hope that one would say he was insane, that not being the case, the only avenue left in this case is the hope that they can put something before you in mitigation, and you heard what the mitigation was, that three people said he had a personality disorder, and that is what the defense wants you to see as mitigation. That is not outweighed by the aggravating circumstances beyond a reasonable doubt.

Now, how could this be mitigation under any stretch of the imagination. The Judge will read to you what the Legislature has deemed to be a factor, and a factor in mitigation for the [2933] sentence, or imposition of sentence of death. And one of those factors in mitigation is that at the time in question the defendant suffered from a mental disease, or a mental defect, that substantially impaired his ability

to conform to the requirements of the law.

Now, what evidence do you have that he had a mental disorder, or defect, that substantially impaired his ability to conform to the requirements of the law? I submit to you that you have no honest, decent, credible evidence as to that issue.

Dr. Bertschinger is the only one that came close, the only man that came close, to saying the man had a mental disease, or a mental defect. And he said, notwithstanding his report, that you will have in the jury room, which he stated in his report, "Generally speaking, personality disorders are not considered to be mental disease or mental illness when being used in an insanity defense. However, it is my opinion that Mr. Spisak's personality deficits are of such severity that he can be considered to have a mental illness or mental disease."

[2934] Dr. Sandra McPherson came in here and told you this, "No, he doesn't have a mental disease, but he has a mental defect."

And she said a mental defect has nothing to do with intelligence. I asked Dr. Bertschinger and Dr. McPherson both what a mental defect is. Both of them clearly explained to all of you, and all of us, what is contemplated by the statute, and what is the suggested psychological and psychiatric terminology mental defect means, intelligence, like Dr. McPherson said, something is wrong, you have a defect in your intelligence, you are unable to learn. Certainly, this defendant does not suffer from any mental defect whatsoever.

Dr. Bertschinger said exactly the same thing. So I submit to you that being said in Dr. Sandra McPherson's testimony as to mental defect, and merely put it aside, because it simply doesn't come

within the statute. Dr. McPherson said unequivocally both the other day and yesterday that this defendant simply does not suffer from a mental disease or a mental defect. Therefore, the evidence that [2935] you have before you from the expert psychologist and psychiatrist says there is only a possibility of a mental disease, or a mental defect, then there is an additional consideration you may take into your verdict, if you so desire, and that is that any factor that you deem to be relevant in favor of mitigation, you can apply it.

For example, if you think the defendant has black hair, and that's a factor into mitigation, you can consider it. If you think the defendant's personality disorder is a factor to be considered in the mitigation, then consider it. If you don't, put it aside, but let's get right down to what the experts have said anyway.

A personality disorder is – my memory, and again if my recollection of the evidence differs from yours, please use your own collective memories and not mine. If I make a mistake, I do so inadvertently. My memory of what the doctor said, a personality disorder is someone who does not obey the law, or does not obey a rule that is described by society and they don't think they are doing anything [2936] wrong by doing it.

And because he says that he is not worry, or that he thought he was right in killing these people, robbing these people, and terrorizing these people, and causing this torture upon these five victims in this case, and their family, because he felt he was right, or was not wrong in doing it morally, that then he has a personality disorder. Well, on what do you base that?

Well, the fact that he left his house as a Nazi at 20 years old, the fact that he was a transsexual at one time, and he was unable to keep mature relationships with other adults, specifically his wife.

Well, I submit to you this, as Dr. McPherson said, everyone in the penitentiary who believes their crime was not wrong for them to commit suffers from a personality disorder. Certainly, that is not mitigation for any penalty for those persons in the penitentiary. Certainly that should not be, and must not be mitigation for the penalty of their imposition of the penalty of death in this case, because it is not something that's unusual.

[2937] Look at Bev Murphy. She testified today. Do you think that Sandra McPherson, when she said it is illogical and a personality disorder trait for a person to keep a gun in their home for protection once their house has been burglarized, do you think that Sandra McPherson if Bev was referred to her, would say she has a personality disorder because of her way of life, because she makes a living outside the law by selling her body, prostituting herself, violating the law every day?

She didn't think there is anything wrong with that. Don't you think that Sandra McPherson, Dr. Bertschinger, Dr. Markey, would all say that she suffers from a personality disorder just as this defense does, because you and I and other people in this courtroom would not subject ourselves to violating that law, and subject our bodies to that, because we chose not to, and we chose to follow the law. That may be the case, but that simply is not mitigation for the imposition of any sentence.

Now, if you determine that there is some evidence of mitigation, and it is up to you, and you

certainly can consider every bit [2938] of evidence in this case, that's why the same jury makes this decision. And I will take a page out of Mr. Shaughnessy's book, and say to you I know that no one is going to be afraid, and no one is going to be disturbed by the decision that you make, because you are not making any, you are not making an emotional decision in this case. What you are doing is you are looking at the evidence, you are looking at the law that applies to the evidence as you find it, and you must, and you are required, and duty-bound, to follow your oath, and that is to let the verdict come by reason of the evidence, as the evidence is and the law is.

What do you have to do, you have to determine the existence, first of all, of a mitigating factor. And if you do, then you compare that with the aggravating circumstances that this defendant has been found guilty of committing. The most mitigation you can find in this case that was presented by this defense was that he has a personality disorder, nothing more. You compare the fact that this man may have a personality [2939] disorder, like every other criminal in the penitentiary, according to the psychiatrist, and then you compare that with the aggravating circumstances for which he has been convicted, and then when you compare those, you make a determination of this, do those aggravating circumstances outweigh any factors you find in mitigation by evidence beyond a reasonable doubt.

And outweigh is a very important term, it means more, greater than, or more than. Now, you ask yourselves this, in the first specification of the first count, that the defendant killed, purposely killed, the Reverend Horace Rickerson while he was

engaged in a course of conduct in which he also purposely killed Brian Warford. That's one out of nineteen specifications. You compare that specification, which the man purposely killed the Reverend, and then purposely killed another in the same course of conduct, and ask yourselves this simple question, does that aggravating circumstance outweigh beyond a reasonable doubt the fact that this defendant has a personality disorder? I think the [2940] answer is obvious. And then you compare, not only the first aggravating circumstance, but the second, the third, the fourth, the fifth, the sixth, all the way up to the nineteenth, and when you compare these aggravating circumstances, look at the evidence, and look at his conduct. Look at the Reverend Rickerson's killing, and say to yourselves, did this defendant have a personality disorder that day, is there anything in his conduct that would justify me in my heart, in my conscience, in mitigating what the law says I must do?

Did he go there – what was his purpose in going to the school that day? Did he go there to read a book, or did he go there for his own selfish reasons? And ask yourselves, does he have a personality disorder, or is he just someone who is selfish; who wants everything that he wants, nothing for anybody else, not doing anything for anyone else and blaming everyone else for his problems?

Dr. Markey said a very enlightening thing, that while even though his parents were at fault for how he turned out, you can't blame [2941] his parents because they weren't sophisticated enough or intelligent enough to know how to deal with what he did, or how he was, or how to explain to him his Nazism was inappropriate.

Now, did that sound like the same kind of

comment that that defendant would make, and that defendant has made throughout this trial? And I submit to you this, that when I got up in my final argument in the guilt phase, I meant every word I said about this defendant sitting down and listening to the testimony and then fabricating what he was going to tell you and it has nothing to do with what the law prescribes, the fact that we have to go first.

The defendant talked to police officers. He talked to doctors, and then he simply got up on that witness stand and told you something else. He told you something different because he didn't like what he said before. And you are the best gauge of his testimony. You saw what his demeanor was when he started. You saw what his demeanor was when he finished. And you saw the contempt he has for you and the entire system, because he thought he could get [2942] away with telling different stories to different people, as long as it was in his best interest.

Now, when he went on February 1, 1982 to Cleveland State University, he was again going in what he thought was his best interest. Was he suffering from a personality disorder on that day when he put his gun, he armed himself with a gun, and said, I will use it if I see fit to use it, if I make that decision to use it. And you know why he was in the rest room. You have demonstrated that by your verdict in that you found him guilty of killing Timothy Sheehan, because Timothy was a witness, and could be a witness, and could have turned him in.

So you know by your verdict that he has no personality disorder to the extent that he didn't shoot Tim and when Tim rebuffed him, and that he left and he came back.

The Reverend was sitting in what he thought was his stall, or maybe that's the stall that this defendant used on a regular basis to solicit other people for acts that he did, and maybe the Reverend didn't take what [2943] he wanted, and maybe the Reverend was upset, and maybe the Reverend said something about God, or said something about, you shouldn't act like this, and that got him angry, that has nothing to do with a personality disorder. All it has to do with is selfishness, and his motivation of helping himself at all times at the expense of anybody.

His children, what did he tell you about Sally Ann? He said, I give the minimum in support. That's what he told you, the bare minimum. And my wife I'm giving nothing to. My family I'm giving nothing to. I don't go, I don't see, I don't participate with my family at all. That's the kind of a person he is. That has nothing to do with the personality disorder.

He has his White Power beliefs. He wears a White Power T-shit. That's not a personality disorder. And when the lady at the Daniel Company is offended, he says, do you think he says later, because you are offended, one person at work, I will take it off? No, he thinks he can get away with it because it is a woman, and he gets away with it [2944] because no one else has the courage to tell him to take the shirt off until the business agent comes down and puts him in a room and puts him up against the wall and says, you take the shirt off or your health is going to be jeopardized – or your job is going to be jeopardized. That's the kind of person Frank Spisak is, because he knew he couldn't get away with it, off comes his shirt.

Where is his big belief in Nazism then? Frank

Spisak comes first, doesn't he, he takes the shirt off, he wants to keep his job, and he doesn't want to get hit or beat up.

What happened on February 1st, he is in there and he is talking to the Reverend Rickerson. The Reverend rebuffs him for the second time. He shoots and kills him. Then he runs. Again, he watches on television, and he gets support from his friends and family, because he tells them that he has killed, and nobody calls the police. And he is happy that he didn't get caught. And he shares this with his pal, Ron Reddish.

They decide, let's go out hunting. It had nothing to do with the Reverend Rickerson's [2945] killing, Nazism, a personality disorder had nothing to do with what happened to Reverend Rickerson and a personality disorder has nothing to do with what happened to John Hardaway, because we know if he has a personality disorder, that puts him in a position where he can't conform his conduct to the requirements of the law. When John walked by, he would have shot him, but he didn't, because that wasn't safe, that wasn't secure.

When Ron Reddish walked in the Black Horse, checked out to find a black guy to shoot, what personality disorder was that? When Ron Reddish and Frankie waited, and sat in the car waiting to attack, and then when he went in and shot John Hardaway down like a dog, what personality disorder was that? Then he stood and aimed right and continued to pull the trigger until John fell, and he ran, and he effected his escape. I don't see anything in the evidence that that is a personality disorder.

That says to me he has cold calculating

results, also, and he doesn't care what any body else feels, he doesn't care what pain, what [2946] suffering, what problems he will bring on anybody else, or their family.

You saw John Hardaway come in here and tell you he is a cripple for life, he can't work properly, he is in pain all the time, every day. There is no remorse. And that simply is not a personality disorder if there is no remorse, because if you believe that, then every time a person commits a crime, and they walk before a jury, or before a psychiatrist, and they say, I'm glad I did it, and if I had a chance, I will do it again, according to Dr. McPherson, that's a personality disorder.

However, if someone comes in and says, I'm sorry, I didn't mean to shoot Joe Dukes, I won't do it again, I feel terrible about it, that is remorse and proper, according to Dr. McPherson. And that's a normal feeling and a feeling I would expect as a psychiatrist.

Therefore, there is no mitigation, there is a personality disorder. If you don't feel sorry, Dr. McPherson says you have a personality disorder, so if you do feel [2947] sorry, then there is no mitigation.

Now, does that make sense to anybody in the jury room? Absolutely not.

And did you know that after they have the two successful hunts, with Reverend Rickerson being killed, not being shot, John Hardaway being shot, and then, frankly, nothing in the newspaper, surprising they had to do something else, but it wasn't like they want you to believe about a Nazi belief, because it if was so strong, and his personality so strong, it would be a continuous thing, one after

another, and it wasn't.

He went to Cleveland State as a thief because he needed money.

Bev Murphy came in here and told you something very significant. She said that she was not his girlfriend, that they did have a relationship, and it was for money. Both Dr. Bertschinger and he specifically said, and Dr. Markey, and Dr. McPherson, Dr. Bertschinger thought it was a very significant item in his mind that a black girlfriend was had by this defendant.

Well, look at Ron Reddish, that's not [2948] in dispute that he had a black girlfriend, that he introduced Bev to Frank Spisak. And he has a black girlfriend that wasn't a prostitute at the time, and we know his conduct was the same with Brian and John Hardaway, and that's not to say his punishment – it should mitigate for what he does, because that's not a personality disorder, that's the kind of person he is. And doesn't care about the people he hangs around with, and it's not a mitigation for what he does.

How could anybody find mitigation in a case with Coletta Dartt? He walked up and he wanted to take her money, he wanted to rob her, and then once he couldn't get it, he got angry and shot at her. And that happens millions of times, hundreds of times every year in this country, a strong-arm robbery, or hold-up with a gun, the person trying to get away, shoots and kills, or he is shot at, and they get away .

A personality disorder because he doesn't think it is anything wrong to be a thief, that's mitigation, that should be [2949] considered by you folks to mitigate the person's mentality in this case?

And then Tim Sheehan, he goes to Tim Sheehan to make sure the police don't catch him. It has nothing to do with making a cause of Nazism. He talks about he has to kill Timothy Sheehan. And who is to say that Ron Reddish isn't standing outside, because he had time to pick the cartridges up on that night. He shoots Tim down. And you know how he shot Tim down, the poor man was standing facing the rest room, unaware and unsuspecting. He is a thief again. How can you mitigate that? How can anybody mitigate?

Any psychiatrist coming in here, none of the three of them even knowing the facts, took time to talk to the prosecutor, talk to the police, talk to the participants to find out what really happened. And they want you to listen to them and consider what they have to testify. Do you think the nerve of someone to come before you – and yes, I did cross-examine on that vein, because it is simple, that's the way it is. Someone has the nerve to come in before you without making a proper [2950] presentation, or proper investigation, and talk to someone for two hours and reads reports, and says, yes, I think he should mitigate in the sentence of death, or the disposition of the sentence of death because of my two-hour conversation with him. You should be insulted by that presentation, and insulted by the evidence.

And when I think that someone can stand up and say 200 years ago the people in the medical profession spun people around in a chair with a hood over the head, and we only know 40 percent out of 100 of what we should know about psychiatry, and you are going to listen to that and consider that, you may, but compare it against the conduct that he has committed, and ask yourselves, certainly, you walk

around and say who does this has to have something wrong with him.

I think we will all agree with this, anyone who walks through the corridor, shoots and kills someone, a man who shoots his wife, wife shoots her husband, their children, there has to be something wrong, because they are [2951] different than you and I, but that's no reason, because they commit a horrible crime, to mitigate the punishment that the law requires.

Timothy Sheehan was robbed and killed simply because he was a witness. That has nothing to do – how could that be a personality disorder? That sounds like a very cunning, calculated result, also acts with absolutely no feeling for anybody but himself.

And Brian, of course, Brian is not the saddest of them all, but because they are all sad, Brian is devastating. Here is a man, simply because he is black and defenseless, that Reddish and Spisak go out and cut him down without a thought or feeling, without a thought for his family, without a thought for anything but themselves and the pleasure that that killing gave them. And the pulling of that trigger, the pleasure and the fun and laughter it gave them because they got away with it, and they can't get caught, and they won't get caught.

[2952] And then if I do come into a courtroom, will put the psychiatric evidence on, I will put the mumbo-jumbo before a jury and hope that they buy it.

Compare these aggravating circumstances. I could talk like Mr. Shaughnessy, talk for an hour-and-a-half. I can quote to you. Mr. Shaughnessy talked to you about John Dunn in his initial

argument, about no man being an island, about for whom the bell tolls. He forgot when John Dunn was writing, same quote, he was dying and he was sick, and he was writing morbid things, and he was writing about death and what caused death. John Dunn also wrote that God take lies in a number of ways, taking them by sickness, taking them by war, taking them by age, and he takes them by justice.

And the law in Ohio, and you all have agreed that if you find beyond a reasonable doubt that the aggravating circumstances that the defendant had been committing, outweigh any factors in mitigation, then you must recommend the imposition of the sentence of death.

[2953] Look through the evidence. Look through all the evidence in the trial. And ask yourselves this question, is there anything in the evidence that is mitigation? Is there anything in this case that I could say honestly and truthfully myself is something that I consider to make me do anything other than the law requires? What in this case, what can I say to myself is in this evidence that will say no, Frank Spisak, you haven not committed these single most horrible crimes I have heard of? How many people does he have to kill before we say enough is enough? If he would have simply killed Reverend Horace Rickerson, and you would have been asked to consider the sentence, they would have come with the same thing, the personality disorder.

He went out and killed a second time, a third time. Everyone has a right to their own life to their own liberty, their own pursuit of happiness, unless it is taken by due process of law. This defendant, and he is the one who put himself in this position. make no mistake about that. When I said that any other argument Mr. Shaughnessy commented [2954] on, it

is his conduct that has required us to be here. Make no mistake about that. He is the one responsible for us being here, nobody else.

Don't be dissuaded by that type of an argument. And look at the evidence in this case and ask yourselves what kind of a person does these acts. Is it a selfish, blameful person, or is it one that has not been able to get along in life. I asked those questions of the psychiatrist. In my mind, for a very important reason. You don't go along in society by having a job, having relationships, having friends, having a house, paying rent, going to school, doing everything and staying with the law for 31 years, and being mentally unbalanced, or mentally ill. You don't do it, because if there was something wrong with him, he would have been pulled in long ago.

But you have the best evidence, that there is nothing wrong with him, and the best evidence is his conduct. Each and every time he knew what he was doing. He wasn't compelled, or compelled by any impulse, or any hidden [2955] voices in his head. He could have stopped each time, and that is the single most important thing in this case, that he could have stopped if he wanted to, and when he was captured, or about to be captured, he didn't go out in a place like someone you think, if he was compelled by this mental problem that he is purported to have, he hid like a rat in the basement, hoping that he wouldn't get caught.

What does he do when he is apprehended? He goes for himself again. He takes his shirt off and says, please – didn't that tell you something about him? He doesn't believe in what he is doing, other than he wants the pleasure of killing, and the fact that he is a thief and doesn't want to get caught, take my shirt because I don't want someone to hurt me,

and the police do.

How about cutting out the book and carrying the gun in the book, that's not an act of one who is unbalanced, or who doesn't know what they are doing. How about cutting up the gun, taking the barrel and throwing it away, how about shaving out the serial number [2956] on the butt of the gun, how about changing the slide and alternating the slide, do any of these things sound like they are acts of someone who is unbalance, who is mentally ill, who doesn't know what they are dong, who is not accurate, and who is not doing everything to please themselves, and hurt others the best they can?

Merely because he has a political belief, what we don't agree in, or agree on is no reason to mitigate his penalty. Because if you find that because he advocates White Power, White Supremacy, and that he wants to carry it out because that's his political forum, an his political forum allows him to mitigate his responsibilities under the law, that's to give a free train to anybody for any reason, if he thinks it is a good reason, if he thinks it is a good reason to kill.

Detective Feckley, because I didn't like brown shoes, and I firmly believe it, and I go ahead and kill him, and I take those shoes and burn them, no jury is going to think that's a good reason to mitigate any sentence because I'm acting out of my own selfish [2957] interest. Again, everything is for my own selfish interest.

Now is the time for him to pay the piper, because his selfish interests are gone you are not going to fall for it. They tried. Give them credit. They had five psychiatrists, two psychologists doing everything, please come up with something, we have no defense, we are caught, the police did an

outstanding, excellent job.

The witnesses identified him. They didn't die, thank God, two people didn't die, because we didn't have the identification. Do you think he would be singing a not guilty by reason of insanity song if you think Coletta Dartt had not survived and John Hardaway had not survived? He thought both of them had died. Don't you think he would be saying, it wasn't me, they can't prove it, it wasn't me?

Once he finds we have the goods on him, he thinks he can put all of the tracks before you. And I think you are going to listen to it and consider it, but everybody, if you think it is mitigation, is it more important than the [2958] aggravating circumstances, absolutely not, cannot be.

Go back into the jury room, talk about what you are about to do. Do the right thing, don't do the easy thing. Each of you ask yourselves, what's the evidence, is there mitigation? And ask yourselves one question, is there anything more aggravating, any circumstance more aggravating that I can possibly think of than someone killing a Reverend because of his own selfish desires, someone killing and shooting at a man because he is black, or because he is of a particular ethnic background, someone killing a family man with children because he saw him some previous day, and because he thought he had money.

Can there by any circumstance more aggravating that that? There is nothing in the law that is more serious, more aggravating than one murder. You don't have one, you have three and two attempts. Nothing can mitigate his conduct whatsoever.

Thank you.

Journal Entry
Dated: July 20, 1983

[scanned]

STATE OF OHIO, } ss.
CUYAHOGA COUNTY }

IN THE COURT OF COMMON PLEAS

MAY TERM, 19 83

TO-WIT: July 20, 1983 AUG 17 1983 19

STATE OF OHIO — PLAINTIFF

vs.

Frank J. Spisak Jr. — DEFENDANT

NO. CR-181411

INDICTMENT — Aggt. Murder w/spec. clm 1-5-6-8
Attm. Murder ct 2 Aggt. Robbery

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State and defendant, Frank J. Spisak Jr., in open court represented by counsel.

The Jury finds, beyond a reasonable doubt as to counts one, five, six and eight that the Aggravating Circumstances which the defendant was found guilty of committing are sufficient to outweigh the mitigating factors. Jury recommends as to each of these counts separately and individually that the Sentence of Death be imposed upon the defendant, Frank G. Spisak Jr.

Sentencing set for August 10,1983 at 10:00 A.M.

James J. Sweeney, Judge
va 8-15-r-n
n-8-11

PROCESSED

SEP 6 1983

GERALD E. FUERST

JUDGE James J. Sweeney

[2986]

THE COURT: Mr. Spisak, on a prior date as to counts 1, 5, 6 and 8, the jury in this case recommended the sentence of death be imposed on the defendant Frank G. Spisak.

Mr. Shaughnessy and Mr. Spisak, would you please approach the Bench?

MR. SHAUGHNESSY: Thank you, your Honor.

(Thereupon the defendant and counsel approached the Bench.)

THE COURT: Mr. Shaughnessy, do you have anything to say before I impose sentence?

MR. SHAUGHNESSY: We do, indeed.

I think probably if you don't mind what we will probably do is have Mr. Spisak, Mr. Spisak does have a statement that he would like to make to the Court, so why don't we let him make his remarks, if that's all right with the Court.

THE COURT: Mr. Spisak, do you wish to be heard before I impose sentence?

[2987] MR. SPISAK: Yes, I would.

THE COURT: Go ahead.

MR. SPISAK: I, Frank G. Spisak, Jr., a Lieutenant in the Social Nationalist Aryan People's Party, an Evangelist in the National Socialist Party, in concert with my peers do hereby set the example for our loyal Aryan kinsmen.

We are totally committed to the principal of building an all white nation, and we know this

cannot be done without a violent struggle and without bloodshed. If we abandon that dream or the means of attaining it, then we are as without principal as the unscrupulous politicians who today rule over our land.

I knew the risks before I embarked upon this mission, yet I can only say that the harder the conflict, the more glorious the triumph.

What we obtain too easily we esteem too lightly. It is endurance only what gives everything its value and we hold nothing too dear to sacrifice even our own lives for our racial nation.

[2988] The common good before self, that is our battle cry, and that is why I am prepared to die as an example to my people, to show that now power on the face of this earth can truly defeat us, destroy us, or prevent us from doing that which must be done.

Even though this Court may pronounce me guilty a thousand times, the higher court of our great Aryan warrior God pronounces me innocent.

I lived for the Aryan nation, and after my death I shall live on in the spirit of those who choose to follow my example.

Heil Hitler.

(Defendant demonstrating.)

THE COURT: Mr. Shaughnessy, do you wish to be heard?

MR. SHAUGHNESSY: Your Honor, it will come as no surprise to you, I am sure, that I will take another view.

Frankly, I am proud of our system. I am proud of the United States of America. I am proud of

being a lawyer in this courtroom.

I have heard what the jury said. You have heard all of the evidence, and I am not [2989] going into that at all.

We thought, your Honor, we thought at the second phase of the case when we have the opportunity to address the jurors after putting on some evidence, the evidence of mitigation.

Now, your Honor, just a moment or two on that subject, your Honor, there are a number of things that could be mitigation, that could be mitigatory, the point I tried to make to the jury, but let me make it very clear to the Court, and obviously, and I think you and I agree on this, I do take another view from Frank.

There is nothing within Frank that you are going to find that is going to be in mitigation, however, and I said this to the jury, let me be repetitious if I might. We can find within ourselves the mitigation and our general assembly, sir, has done that.

You have heard from Dr. Markey, you have heard from Dr. Resnick, you have read the reports that were supplied and submitted by the various psychologists, psychiatrists, the various clinics, and there's another [2990] gentleman whose name escapes me, but in any I event there were five or six or seven psychiatrists and psychologists that were involved in this case and at least that was a common thread, and that thread was that Frank Spisak is sick.

Frank Spisak has a serious mental problem, not serious enough, and we're not going to retry the case this morning, not serious enough to provide in

the view of the Court, because of course, you heard the evidence from the witness stand, not serious enough to make a defense; however, still in our view, and you still have this opportunity, in our view there is sufficient evidence, sufficient enough to mitigate and the defense can be a complete defense and that file, those same set of circumstances, or the same set of facts can then be mitigation.

And again here I think, your Honor, you don't look at Frank Spisak and say, I want to find something within you, something that you have done, some ideal that you hold, something that you cherish, some good thing. I don't look to you and try to find mitigation, [2991] there is none, we know that, and he has told you as much as that; there is none.

However, I think we look to ourselves, I think we look into our own backgrounds and that really is the irony. Those things Frank Spisak just said to you, if these people, and that's the great thing about being an American, if these people, however -- well, let's carry it to the conclusion.

If the folks who disagree with us had their way, I would not now have an opportunity to stand in front of a fair and impartial Judge and present this because the thing would all be over, just put the guy before a firing squad and it would all be over.

So what I'm saying, your Honor, the irony certainly is there, so the courts in looking at our heritage, the way we are, the ideals, the hopes and dreams that we cherish, we have told our general assembly what we want you to do and we did that because we are the people. We are the general assembly and they are merely the ones that follow the word.

We told them we want a law that will encompass mitigation.

[2992] Our laws say you can't commit a sin if you don't intend to do it. It goes to the intent. The mitigation here is did he have the mental ability to do the crime that's been ruled on and we have already agreed, but our general assembly, not thinking about him, but within our self-government we say the diminishable, the diminished mental state is mitigation. You have heard the mitigation, your Honor, and all that I can do is, once again, your job is certainly not an easy one. It is probably the loneliest place in town sitting on the bench, and I certainly respect you for that, and I certainly compliment you for accepting that position; and it is a lonely position.

I can only say to you the mitigation we brought forth was not from anything he did, not from anything within, it came from within ourselves, what we told our general assembly to do, and based on that, your Honor, I would ask you to spare this man's life.

THE COURT: Mr. Spisak, I find the acts you were convicted of committing were unspeakably despicable.

[2993] I find your views, while that does not matter, we are not here because of your particular political views, I personally find those equally despicable, and I am going to accept the recommendation of these four counts of the jury.

It will be the sentence of this Court that count two, the count of attempted murder, that you serve a term of imprisonment from 7 to 25 years at the Southern Ohio Correctional Facility at Lucasville.

Count three, the count of aggravated robbery, the sentence of this Court is that you serve a term of imprisonment of 7 to 25 years at the Southern Ohio Correctional Facility at Lucasville.

As to count four, for aggravated robbery, it shall be the sentence of this Court that you serve a term of imprisonment of 7 to 25 years at the Southern Ohio Correctional Facility, and these counts are to run consecutively.

Now, as to counts 1, 5, 6 and 8, this Court finds beyond a reasonable doubt, as to each count separately and individually that [2994] the aggravating circumstances which the defendant was found guilty of committing outweighs the mitigating factors.

This Court, therefore, adopts the jury's recommendation that a sentence of death be imposed for each one of these counts.

As to each of these counts, separately and individually, the Court orders that the defendant, Frank G. Spisak, Jr., be transported to the Southern Ohio Correctional Facility at Lucasville and the sentence of death, in the manner prescribed by law, be carried into effect on the morning of February 1, 1984 at ten a.m.

Now, Mr. Spisak, you have a right to an appeal in this case.

You have a right to have a notice of appeal timely filed in your behalf.

Now, obviously, you have been indigent throughout the trial, so I am going to find you to be indigent and the Court will provide the necessary documents to you for this appeal, and I will appoint Mr. Shaughnessy and Mr. Gardner to represent you.

MR. SHAUGHNESSY: Thank you, your [2995] Honor.

THE COURT: Is there anything further, gentlemen?

Mr. Shaughnessy.

MR. SHAUGHNESSY: No.

THE COURT: Mr. Spisak, may God have mercy on your soul.

We are now in recess.

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Cleveland, Ohio
Clinic No. C 16,544
September 30, 1982

Social History prepared by Stephen D. Williger
PSYCHIATRIC CLINIC

NAME: FRANK GEORGE SPISAK, JR.

CURR ADD: None.

PARENT'S: 13577 Mohawk Trail, Middleburg Hts, OH

AGE: 31

DOB: REDACTED

SSN: REDACTED

CHRG: Aggravated Murder with Specifications, Attempted Murder, Aggravated Robbery & Receiving Stolen Property

REFERRED BY HONORABLE JAMES J. SWEENEY

SOURCES OF INFORMATION:

Two interviews with the defendant, 9-24-82.
Office interview with the defendant's sister, Sharon Spisak, 9-28-82.
Office interview with the defendant's sister, Nadine Spisak, 9-29-82.
Office interview with the defendant's mother, Irene Spisak, 9-28-82.
Office interview with the defendant's father, Frank

Spisak, 10-1-82.
Review of jail medical records, 9-28-82
Prosecutor's File (unavailable).
Attempted contact with the defendant's attorney.
Medical records requested from Metro General Hospital and St. Vincent Charity Hospital.

CHARGES: The defendant is charged with four counts of Aggravated Murder with Specifications, three counts of Attempted Murder, one count of Aggravated Robbery and one count of Receiving Stolen Property. He is referred for evaluation under O.R.C. 2945.371, Competency to Stand Trial.

PRIOR LEGAL: The defendant reports that in 1978 he was arrested for Promoting Prostitution. He states that he was on Prospect Avenue "in drag" trying to solicit "men, you know sex, for money." He reports that he was placed on probation for approximately six months.

HEALTH: The defendant reports a head injury (concussion) resulting from a 1966 car accident. He was conveyed to St. Vincent Charity Hospital and released after several hours. Medical records have been requested. In addition, the defendant reports having been thrown out of a moving vehicle in 1978. He states that he had been on Prospect soliciting and was taken for a ride by a customer. When the defendant became afraid, he jumped out of the car while it was moving. He reports having been unconscious for an unknown amount of time. He again received treatment from St. Vincent Charity Hospital.

The defendant considers himself to be in good health and complains of no physical problems.

CURRENT FUNCTIONING: The defendant is a 31 year old, White male who is housed on the third floor of the Jail, where he is in "protective custody." He has been given no medication since incarceration.

The defendant is a well-nourished male, approximately 5'7". He wears wire-rimmed glasses with relatively thick lenses. He is cooperative and pleasant. Speech is rational and coherent and spoken at a normal rate. His speech is sprinkled with references to the economy and working class. There is no evidence of visual or auditory hallucinations.

The defendant reports that in 1979, after his wife had left him for the first time, he came to believe that he was the reincarnation of Adolf Hitler. This belief arose, according to the defendant, because he and Hitler looked alike and had other similar physical characteristics. The defendant reports beginning to feel that he was on earth "to try to succeed in what I failed in the last time—I thought I did pretty good, until I was caught by the police." His belief that he was Hitler reincarnated was shaken after his arrest when police "took all my guns – I should have been free to keep doing what I was doing." The defendant explained that he and "just a few others" were raising an army to move into action when society's fabric began to collapse. They then attempted to set up a system "based on racial ideas." The defendant states that he is now confused regarding his past ideals and whether or not he really is Hitler reincarnated. He states that he now reads religious books and sometimes feels the he is Christ "going through my sufferings."

The defendant reports that as a child he began to experience repeated nightmares. In one dream, the defendant was run over by a truck. In other dreams,

he would be flying away from people attempting to hurt him. Sometimes he would crash, being unable to fly.

The defendant reports that he would see things as a child and teenager, but adds, "It might even happen to me now." He states that he saw walls "move in and out." He states that he saw rooms change shape. In addition, when the room would change, the defendant would hear people laughing at him. He reports experiencing this most recently, approximately six months ago.

The defendant describes himself as a bored and restless individual, who has seldom felt happy. He states that he has been depressed since his wife left him for good in 1980. He began to feel suicidal in 1980 and this lasted until his arrest. He states that he now has his trial "to live for" and might "get the chair" which would "end my misery." The defendant states that the electric chair "offers more light at the end of the tunnel than spending the rest of my life in prison." In December, 1979, the defendant took over-the-counter sleeping pills in a suicide attempt. The defendant describes this as the only suicide gesture he has made, "other than sitting in my room and sort of playing, like Russian Rhoulette with my loaded guns."

Regarding his temper, the defendant reports that his wife used to tell him that he had a "violent temper." When angered, according to the defendant, he would "yell, holler and punch." The defendant reports that, at times, he has felt homicidal. On at least one occasion, he pointed a gun at his ex-wife and feels that he would have "maybe" shot her if she hadn't run away.

The defendant did slow and sometimes inaccurate serial sevens but was better on serial threes. Proverbs were interpreted with a mixture of abstract and concrete interpretations. The defendant is aware of current events and began to editorialize on Israel's "expansionism." He named all of the Great Lakes. Speech is generally articulate but mixed with poor grammar. The defendant is oriented to person, place and time.

DEFENDANT'S ACCOUNT: On the advice of his attorneys, the defendant would not discuss the charges of Aggravated Murder and Attempted Murder. This interviewer spoke to attorney John Gardner who stated that his client has been instructed not to discuss the charges. Mr. Gardner stated that he would appreciate it if the defendant was not questioned at all regarding the charges.

The defendant did indicate, however, how he was arrested. He states that in early August, 1982, he had been laid off from his job as a machinist. Although he would look for work daily, he was unsuccessful. He became "real distressed" because he owed the landlord two months rent and was also behind in payments to other creditors. He reports that he knew a "hooker" who wanted to buy one of his guns. She wanted to know if it was operable so the defendant fired some shots from his window. Police were called and the defendant was arrested. The defendant states that he was charged with Disorderly Conduct and was released on bond. According to the defendant, police then received a tip, from an anonymous caller, who told them that the defendant had committed killings at Cleveland State University.

Although the defendant did not now of the telephone call to the police, he indicates that he was

despondent and drinking, thinking that he would kill himself. A friend, Ron Reddish, told the defendant to spend the night with him. While the defendant was there, police came to Ron's home. Ron told the defendant to hide in his basement, which he did. Police, however, found the defendant and arrested him.

SOCIAL HISTORY: The defendant was born in Cleveland on REDACTED to Irene and Frank Spisak. He is the oldest of three children. One sister, 29 year old Nadine, has been regularly employed and lives on her own. Nadine has made two suicide gestures within the last four or five years and repeatedly threatens, according to the defendant, to kill herself. Twenty-eight year old Sharon, also lives on her own and works as a secretary. The defendant describes Sharon as the most "stable" of the three children.

Frank Spisak, Sr., age 60, has been employed for the past 20 years as a factory worker at Lester Engineering Company. He has also enjoyed playing the trumpet with polka bands on weekends. The father is described as a "quiet" man who "had nothing to do with us kids." The mother had all the responsibility for the children. The defendant states that there has never been open communication between the father and the children. The mother, age 52, is described as a "real strict" individual. Her punishments ranged from the loss of privileges to having the children kneel on the floor "for hours" without moving. Regarding discipline, the defendant states, "I think they call that Catholic punishment." As the children would be kneeling, the mother would tell them that they looked "nice and holy." If they moved while kneeling, the punishment would be increased in amount of time. The mother is also

described as being "very neat and clean." The defendant reports that she would line knick-knacks on a table with a ruler and, therefore, always know if they were out of place.

The mother was the dominant spouse in the marital relationship. The defendant would sometimes observe her parents arguing about the children but states that the mother would always win because "she ran the house." Of his father, the defendant states, "rather than incur her (mother's) wrath he would stand in the background." One example was the mother's decision for all the children to leave the home at a certain age. When the defendant turned 19, he was forced to leave home and this occurred even though the father disagreed. It was felt by the defendant that he was thrown out in disgrace and there was no option to return home.

The family is described by the defendant as being middle-class with the children having been provided with all necessities. The family generally attended Catholic Church on Sunday. As a child, the defendant was forced to attend.

The defendant graduated from Midpark High School in 1969, after completing his public school education. He described himself as having been a "A and B" student, who was on the "merit roll." He participated in the chess club and choir. The defendant reports that he had no friends while in school, although he "hung around" with certain individuals. He states that he felt different from the other children. The defendant was never allowed to take gym class because of his poor eyesight. He states that his view of the world also differed. At the age of 14, he reports becoming interested in Adolph Hitler and Hitler's ideology "appealed" to him. The defendant states that while his classmates believed

him to be inferior, the literature he read made him feel superior.

The summer after graduation, the defendant worked two jobs because he needed money to enter Cleveland State University in the fall; his parents would not give him money towards his college education. In fall, 1969, defendant entered Cleveland State University where he completed one academic year. He states that he studied European history, German and philosophy. He reports having received A's in all courses except German, which he failed.

During the summer of 1970, the defendant again worked and saved $2,000 even though he had "shit" jobs which paid little. He would have returned to CSU but his parents forced him to leave the home. The defendant then had to get an apartment and a more permanent job. He moved into a furnished apartment by himself and found a job at Kay's Book Store, where he worked for two years. He then secured a better paying job at Cleveland Electronics, now out of business. A few months later the defendant found a job, which he held for five years, at Lenton Manufacturing Company. He was trained as a machinist. He was finally fired in 1978 when he began to go to work dressed like a woman. The defendant, dressed as a woman, applied for and received a job at Dr. Frederick's, a maker of eye glasses. After a few months, when the boss found out that the defendant was not a female, he was fired (June or July, 1978).

The defendant reports that he had "fantasies," beginning at approximately age eight, that he was a female. He began to think that he was born "in the wrong body." Before 1977, the defendant would think about his gender. However, in 1977, he began to wear women's clothing and tried to pass himself

off as a female. In 1978, the defendant began to be seen in Metro General's Gender Identity Clinic. He was given estrogen as well as out-patient treatment. He reports that near the end of 1978 he "decided to go back and be a guy again." Since that time he has not dressed in women's clothing. He then tried to be "overly macho" in his dress, wearing boots and chains.

Returning to the period after he was fired from Dr. Fredericks, the defendant states that he dressed as a woman and solicited men in the Prospect area. Since most of the sex was "oral," the defendant "fooled" most of the men he solicited. He states, "They (clients) were either being fooled or letting themselves be fooled." The defendant was arrested on one occasion for soliciting. He stopped soliciting in the fall of 1978, although he continued to dress like a woman. He found a job at Kelly Girls, where he worked for three or four months. As the defendant began to look "rougher and rougher," that is, more like a man, he was fired. He found another machinist job, this time dressed like a man. After a year, he secured a better paying job at the Daniel Company. He was employed there until he was laid off in August, 1982.

Early in 1979, shortly after he began to dress like a man, the defendant began to correspond with the National Socialist Party of America, located in Chicago. He then subscribed to "every racist, extremist" periodical "in this country." He also purchased records and trinkets, such as Nazi flags, daggers, knives, guns, mementos and pins. Six years earlier, after leaving college, the defendant had joined the National Socialist of White Peoples Party in Cleveland. A picture of the defendant appeared in the newspaper. This photograph was taken,

according to the defendant, in 1972 when he appeared at a Cleveland City council meeting with other members of the Cleveland-based organization. After two years, the defendant left that organization because he did not get along well with other members. The defendant states, "They all hated me."

At the time of his arrest, the defendant was living alone in his apartment. He had been unemployed for approximately three weeks to one month. He indicates that he was experiencing tension headaches due to his lack of employment. He was very worried because he did not have money to pay bills. None of the defendant's worries were related to the fear of being caught by police.

MARRIAGE: The defendant married Laverne Lampert in October, 1973. The couple had met at the factory where both had been employed. After approximately six months the couple was married. The defendant states that Laverne was the first female he had sexual relations with. The couple's only child, eight year old sally, was born in April 1974.

The defendant reports that the couple argued and sometimes he would beat his wife up. Laverne never pressed charges. The defendant reports having once shot Laverne in the stomach with a BB gun; she required hospital treatment. Laverne would tell the defendant that he was "violent" and "like a madman when I didn't get my way." The defendant states, however, that Laverne would "egg me on and it seemed like she wanted to get beat up." When the defendant began to dress like a woman, Laverne secured a divorce (March, 1978).

Approximately six months after the divorce, the couple began to see each other again. Laverne would visit the defendant at his apartment and this often led to sex. When the defendant stopped wearing women's clothing, he tried "to get her back." The couple were remarried in March, 1980. Four months later, however, Laverne left the defendant for good. The defendant explains that during the two years he was divorced he was lonely and had become involved with the Nazi party. Laverne was "repulsed" by "Third Reich memorabilia" which the defendant would not sell because he considered it to be a symbol of virility and manhood. Laverne felt, according to the defendant, that he "loved that stuff more than her." One day, the defendant returned from work to find that Laverne and his child had moved out. He states, "I've been living along like that since then, me, myself and my flags and different things."

The defendant describes having had a "normal" sexual relationship with Laverne. He states, "She didn't go for that kinky stuff."

MILITARY: After high school the defendant attempted to enlist into the Army, but was rejected due to poor eyesight.

DRUGS/ALCOHOL: The defendant has used marijuana for the past ten years. He would smoke approximately once a month until four or five years ago, at which time he would smoke weekly, depending on "the availability of it." At the time of his arrest, the defendant had been smoking marijuana daily for several months. At the time of his arrest, the defendant had approximately $5 worth of marijuana, as well as a "good size lump" of hashish. In 1979 or 1980, the defendant began to use LSD or Mescaline weekly. He usually took

"microdot." For a three year period, the defendant estimates that he took "microdot" on between 50 & 100 occasions. He states, "It affects your imagination." He denies the use of other illicit drugs

The defendant describes himself as a moderate user of alcohol who became intoxicated regularly for a three-month period in February, 1982. He states that during that time he was living with a woman who was an alcoholic.

PSYCHIATRIC HOSPITALIZATIONS: None.

REVIEW OF JAIL MEDICAL RECORDS: The booking sheet indicates that the defendant entered the County Jail on 9-9-82. Notes of Steve Friedman, Ph.D., dated 9-13-82, indicate that the defendant was transferred to the Psychiatric Unit for security, not psychiatric reasons. Dr. Friedman saw no evidence of psychotic symptoms or of a mood or behavioral disorder. The defendant expressed relief at being in jail, so he did not have to worry about money, food or shelter. The defendant appeared well-manner and did not exhibit loosened associations. There was no evidence of hallucinations.

Later in the evening of 9-13-82, the defendant was placed on suicide precautions after a Correction Officer confiscated a poem. The poem was signed by the defendant and dated 9-12-82. The poem's title is Killer. It reads as follows:

Killer

Upon the gallows killer stood,
while the executioner placed on his hood.

He did not have last words to say,
for on this earth, he wished not to stay.

They placed the noose around his head,
In five more minutes, he was dead.

On 9-15-92, when the defendant saw Dr. Colizoli, he told her that he had written the poem when he was 13 years old.

Dr. Colizoli's notes, dated 9-15-82, indicate that the defendant had made no suicide gestures. Mental status was that of a calm, cooperative and pleasant individual, who exhibited no agitation or anxiety. Suicidal ideation was not present. Dr. Colizoli's notes indicated that the defendant felt bad about what he had done. Dr. Colizoli noted no psychosis and added that the defendant was oriented. The defendant was seen as not being suicidal and suicide precautions were discontinued.

OFFICE INTERVIEW WITH DEFENDANT'S SISTER: SHARON SPISAK

Sharon reports that her brother had no childhood problems. She indicates that she has never observed evidence of severe mental illness, even though she states that she has seen the defendant depressed and has watched him go through "that gay stuff." Sharon considers her brother to be "a genius" who was able to fix "almost anything," even as a young child. She confirmed the disciplinarian measures by the mother. Sharon reports that the defendant was thrown out of the house because of his involvement in Nazi organizations. The family's home was vandalized (a swastika was painted on a garage door) and the parents were fearful. They told the defendant to either leave the Nazi organization or leave home; the defendant chose the latter.

Sharon reports that she was the favorite child of the mother. She states that she received preferential

treatment, different from that accorded to the defendant and Nadine. The mother-Nadine relationship was described as having been poor and Nadine's suicide attempt, at the age of 19, was tied in with this poor relationship.

Sharon states that the defendant has been depressed since his second divorce. He would, "always," when speaking to Sharon, mention Laverne. She reports that her brother alternates between sadness and anger concerning his ex-wife.

During the time period in which the crime took place, Sharon states that she had the most contact with the defendant of any family member. Every week he would borrow money from Sharon, which he would pay back the following week. Sharon states that the defendant was purchasing "a lot of guns." Although she indicates that she has information regarding the crimes, she refused to discuss it unless she was forced to. She states that "so many months before this happened" the defendant had told her that he was doing the work of the Lord. He would quote verses from the Bible and interpret them "to his special purpose." Sharon noticed no change in the defendant's behavior around the time the killings were committed. She stated that he continued to be depressed and felt that his "life was messed up."

OFFICE INTERVIEW WITH THE DEFENDANT'S MOTHER, MRS. IRENE SPISAK:

Mrs. Spisak reports that the family's climate at the time of the defendant's birth was good. The defendant was a very likeable child, who began to speak at approximately six months of age. He experienced no unusual childhood problems, and his behavior was not a problem at school. His mother described him as having been a good student who

was "very intelligent." Mrs. Spisak states that her son was beating adults at chess at the age of ten.

The defendant was always interested in history and his interest in Nazism began in high school, although the parents were not then aware of it. Mrs. Spisak reports that while her son was in college, he wore a swastika and was involved with a Nazi organization. Just prior to his second year of college, the mother learned of his interest and activities. She states that she and her husband told the defendant to "either give up the Nazis or move out of the house." The defendant moved into his own apartment.

Mrs. Spisak indicates that the defendant married a girl who was "low intellectually-there was no mental stimulation." The defendant had told his mother that he married Laverne because she had "big boobs."

During the period that the defendant dressed like a woman, his parents did not see him. The mother states, "I wasn't going to help him become a woman." During this period, the defendant continued to speak rationally and the parents did not notice any severe mental illness. However, Mrs. Spisak reports that the defendant would bring homosexuals to the home he shared with Laverne and have sex in front of his ex-wife. The mother states that Laverne would call her and inform her of these activities.

During the time period of the crime, for which the defendant is charged the parents had contact with the defendant on only one occasion (April, 1982). The defendant called and indicated that he wanted to see his parents, but the mother refused telling the defendant, "you're still sucking guys." The defendant responded, according to Mrs. Spisak, that he "doesn't suck guys Mom, I just kill niggers." At the time of

his arrest, according to the mother, the defendant had two black girlfriends.

Finally, Mrs. Spisak reports that during the defendant's first year in college, he told her that he had read a book which had taught him how to appear insane to a psychiatrist.

OFFICE INTERVIEW WITH NADINE SPISAK:

Nadine described her mother as a "little crybaby" who was manipulative with the children. Sharon was the favorite child and Nadine and Frank received quite a bit of criticism. Nadine indicates that her mother's negative remarks were directed at the two children "all of our lives." Nadine describes her father as the weaker spouse who was dominated by the mother.

Nadine believes that the defendant was "pushed around" as a youth and consequently needed someone to look up to. Hitler was well-suited since he represented power. Nadine states, "He needed that image."

Nadine further reports that her brother "has always" had an obsession with violence. He was violent with his wife, although he did not exhibit violence toward other family members. Nadine described the defendant as really being two persons, one of whom is violent. Nadine had the feeling, for a long time, that there was more to the defendant than he would present to others.

Nadine indicates that the defendant never appeared to respond to hallucinations. However, he talked about being on a mission of God. The defendant would ask Nadine if he looked like Hitler. She states, "If he didn't believe that he was Hitler, he sincerely wanted to be, I think."

During the period that the killings took place, Nadine noticed no change in the defendant's behavior. In February, 1982, the defendant had told Nadine that he had killed someone. Although the defendant's story coincided with a newspaper account, Nadine did not believe her brother at the time. However, she states, "I knew he had it within him."

Nadine believes that violence was the defendant's "last outlet for rage." He had repeatedly stated that, "Nobody loved me." In approximately, May 1982, after Nadine asked the defendant who he was, he responded, "I'm a psychopathic killer because nobody loves me." Nadine states, "He was always dealing in aspects of hate."

Nadine, a pretty short-haired girl, appears troubled. Speech is very rapid and pressured. She exhibits no eye contact. At times, during the conversation, her voice was raised.

OFFICE INTERVIEW WITH DEFENDANT'S FATHER: FRANK SPISAK, SR.

Mr. Spisak indicates that his son had no severe childhood problems and added that he has never observed his son to have any "mental problems." As a child, the defendant was a heavy reader, who appeared very intelligent to the father. In addition, Mr. Spisak indicates that his son never appeared to be a violent individual "as far as I know."

Mr. Spisak states that he has had no contact with his son within the last four and one-half years except for a few telephone calls. Mr. Spisak also had no contact with his daughters for at least two years, until after the defendant's arrest.

Mr. Spisak reports that his son was given a chance of either remaining in the home and giving up his activities with the Nazi Party or leaving home. The defendant chose to leave the home after which, according to Mr. Spisak, the FBI came to see the parents. The FBI, according to both parents, wanted to know what the defendant "was up to."

Mr. Spisak reports that he and his wife had no contact with the defendant during the time period the killings took place. Mr. Spisak states that he first heard of his son's activities when they were reported on the t.v. news. In addition, Mr. Spisak and his wife have had no contact with the defendant since he has been incarcerated.

After the above information was obtained by Mr. Spisak, Mrs. Spisak reentered the office where both of them spoke jointly. Mrs. Spisak stated that the defendant had told her he wanted a sex change operation because he wanted to become a prostitute so that he would not have to work. He told his mother that his daughter would "just have to accept two mommies."

When the defendant was married to Laverne, he would wear a brown shirt and a swastika armband. The parents were informed of this by the father-in-law. The parents would not allow the defendant to "come around dressed like that."

Finally, the parents indicated that they were surprised at the defendant's arrest since he was a "talented piano player" and was "good at anything he tried."

TELEPHONE INTERVIEW WITH DEFENDANT'S ATTORNEY: JOHN GARDNER (9-30-82)

Mr. Gardner states that he and the co-counsel were

"just touching all of the bases" in referring him for an evaluation as to his competency to stand trial. Mr. Gardner stated that the attorneys have had very little contact with the defendant and not yet been able to get into the "nitty-gritty" of the case.

Mr. Gardner promised to have co-counsel, Tom Shaughnessy contact the Clinic. This has not, as yet, occurred.

SW/kb
10-6-82

COURT PSYCHIATRIC CLINIC
Justice Center
Courts Tower – Sixth Floor
1200 Ontario Street
Cleveland, Ohio 44113

October 12, 1982
October 14, 1982

RE: FRANK SPISAK
DOCKET NOS. 176716, 176517 & 176651
REFERRED UNDER: 2945.371

Honorable James J. Sweeney
Courts Tower 18-C
Justice Center
Cleveland, OH

SUMMARY

This 31 year-old, divorced, White man was referred for psychiatric evaluation under Ohio Revised Code Section 2945.371, Competency to Stand Trial. He is charged with Aggravated Murder with Specifications, Attempted Murder, Aggravated Robbery and Receiving Stolen Property. Mr. Spisak was interviewed on October 12, 1982 and October 14, 1982 for about two hours on each occasion. In addition, I reviewed the following documents in preparing this report:

1. Detailed Social History prepared by Stephen D. Williger of the Court Psychiatric Clinic, which included a summary of his interviews with the defendant's two sisters and parents;

2. Psychological testing report prepared by

Stanley Althof, Ph. D.;

3. Information contained in the prosecutor's file;

4. Records from Cleveland Metropolitan General Hospital.

Mr. Spisak was informed that the information obtained in my interviews with him would not be kept confidential and that a report of my evaluation would be sent to the Court.

Post-Psychiatric History: Mr. Spisak never received any psychotherapy, psychotropic medication or hospitalization for psychiatric problems. He states that at age 14, he embraced the Nazi ideology. He reports that he became obsessed with it. He later reports becoming obsessed with the idea of becoming a woman. He was briefly seen at the Gender Dysphoria clinic at Cleveland Metropolitan General Hospital. He did receive estrogens so that he could develop breasts and presented himself as a candidate for surgical transition to being a woman. He dropped out of the program. He then gave up the idea of becoming a woman. During a period of time, he did dress as a woman. When seen at Cleveland Metropolitan General, he was not viewed as psychotic.

He describes going through periods of being obsessed with guns, Nazi memorabilia and violence. He describes fantasies in which he thought about being a secret agent or being very much identified with Hitler.

Drug History: Mr. Spisak states that he began smoking marijuana when he was 21 years old. He initially used it occasionally, but it increased to the point of being used daily for the last two or three years. He reports using about one ounce each week,

which he rolled into 40 to 50 joints. He states that while he was smoking marijuana, it made him strange. He states, that since he's been in jail, his thinking has become much more clear than it was in a long time because he is free of marijuana. He states that while smoking marijuana, his fantasies were exaggerated and became "bigger and more real than before". He stated "a person living on the verge using marijuana makes it hard to distinguish what is real and not real". He reports that smoking marijuana was so important to him that at times, he would starve himself, eating no meals in a day so he would have money to buy it. He reports that he did reflective meditating during the time he was smoking. He reports that there were times during smoking that he believed that his fantasies were true, but that this did not occur, to his knowledge, when he was not using daily marijuana.

Mental Status Examination: Mr. Spisak is a neatly attired White man, who appears his stated age, who was cooperative and affable during the interview. He did decline to answer certain questions which were either embarrassing or which he felt might violate his right to not incriminate himself. He was oriented to time, place, and person. He was able to subtract serial sevens accurately from 100. He was able to name four out of the last five Presidents accurately. He stated that he has never experienced any hallucinations. He did describe the fact that at times, he has heard people laughing at him every now and then. He also described a visual illusion of the walls closing in on him or expanding far away from him when he was a child falling asleep at night. He has never actually heard voices talking to him nor seen visions. In interpreting proverbs, he demonstrated the ability for abstract thinking, but did take one of the proverbs personally. When I

asked if he felt others controlled his mind, he replied that he was easily influenced by people. He stated that no one had actually ever taken thoughts or ideas from his mind or controlled him my implanting ideas in his mind. He did describe periods in which he wondered if he were possessed by a demon. He stated that he had his concern because he felt driven at times by evil ideas. He stated that he never actually saw a demon and he only speculated that being possessed by a demon would be one explanation for his "evil" thinking. He described some ideas of reference, that is, the belief that when other people had conversations among themselves, they might be referring to him. He showed some mild paranoid ideas with the idea that he could not trust anyone. For this reason, he slept with a gun under his pillow. Just prior to his arrest, he reports being fearful that a friend was setting him up to go to Michigan so that he could be killed and his furniture could be stolen. He believes that this was likely but is not fixed in his belief about it.

He reported that at one time, he felt like an angel who lived in Heaven who was sent to earth to be tested. He quoted passages from the religious book, "My Daily Bread" to support the idea. When pressed, he admitted that his memories of being in Heaven may have been fantasies rather than him being certain that he was there. He stated that he does not believe he has special powers or a special mission on earth. He spoke in religious terms about all people being either God's people or devil's people, but this was not presented as a delusion but a view of good and bad people.

On occasion, he reports that he had the feeling that he was Hitler reincarnated. He states that he does believe in reincarnation. When this was

examined in detail, he stated that Hitler's ideas and spirit lived in him but he did not believe that he was literally Hitler. He made the analogy that the spirit of Christ is in Christians and in that sense, the spirit of Hitler was in him. He stated that some of these ideas might be "autosuggestion" because he had so many books about Hitler. He stated that when he was stripped of his Hitler books and Nazi memorabilia, he seemed less influenced by these ideas. Parenthetically, this coincided with his stopping the use of marijuana due to incarceration.

He reports that within the last two years while smoking marijuana daily, he had the idea that he was the Angel of Death, or at least that the was living like one of the angels of death. He states that he purchased from an individual who was wearing it, a T-shirt with wings on it. He states that he got the clothes to fit with his feelings. He did not feel that he had any special power or that the shirt gave him any special power. He viewed it as one additional item in his collection of junk that he had a morbid fascination for. He reports at one time, he believed he had a mission of the Lord to be a leader, but no longer thinks this. The Lord never spoke to him; it was simply an idea that he developed in his mind. He reports that he has no desire to die at this time, although he was depressed after his wife left him.

Competency Assessment: Mr. Spisak said that he was charged with several counts of murder and attempted murder. He knew that he could spend life in prison or be executed, if convicted. He knew the names of his two attorneys and reports that he heard that they were good. He was open to considering the possibility of plea bargaining and understood the concept. He was uncertain about what the outcome of the trial would be, but accepted the possibility that

he would be incarcerated. When asked whether he would consider pleading an insanity defense, he replied that "I don't think I'm crazy," but that he would discuss it with his attorneys. He did not seem disturbed by the prospect of spending time in prison because of its structured controls and three regular meals each day. However, he said that he was doing everything he could do to defend himself and was not seeking to be convicted. He stated that the function of the jury was to decide if the defendant is guilty or not guilty. He stated that the Judge was like the boss in the courtroom. He said the role of the prosecutor was to "be out to get me". He stated that the role of the defense attorney was to "protect me and my best interest". He stated that witnesses were supposed to tell the truth. He had concern that some witnesses might lie about him. He reports that he would listen to the advice of his attorneys but knew that at times, he had talked too much when they advised him against it. He is aware of possible legal defenses. There is no evidence to suggest he would be unmanageable in the courtroom. He has an adequate understanding of court procedure. He is able to disclose the facts about the case to his attorneys and states that he has done so. He is able to testify relevantly in his own behalf. There is no evidence of self-defeating motivation with respect to his trial.

Impression: Schizotypal personality.

This diagnosis is manifested in Mr. Spisak by evidence of bizarre fantasies and preoccupations, ideas of reference, social isolation, recurrent illusions, vague metaphorical speech, suspiciousness and paranoid ideas, and hypersensitivity to criticism. He does not meet the criteria for schizophrenia because of the absence of bizarre delusions, auditory

hallucinations and loosening of associations. Psychological testing does demonstrate a disturbance in his thinking process but it does not demonstrate classical signs for schizophrenia.

Opinion: Mr. Spisak has demonstrated some disturbed thinking and psychiatric symptoms. However, this thinking has improved substantially since he has been incarcerated. There is no evidence that his mild paranoid thinking currently would interfere with receiving a fair trial. He does understand the charges and proceedings against him and is capable of cooperating with his attorneys in the preparation of his own defense.

s/Phillip J. Resnick, M.D.

PJR:ssp
10-14-82

PSYCHOLOGICAL EVALUATION

Name: Frank Spisak

Age: 31

DOB: REDACTED

Seen: 9/30/82

Referral:

Frank Spisak is a 31 year old divorced, Caucasian male referred by the Court for psychological evaluation under Section 2945.371 of the Ohio Revised Code - Competency to Stand Trial. Mr. Spisak is awaiting trial on the following charges: four counts of Aggravated Murder; three counts of Attempted Murder; one count of Aggravated Robbery and Receiving Stolen Property. Dr. Phillip Resnick, psychiatrist at the Psychiatric Clinic, referred Mr. Spisak for psychological assessment to assist in clarifying the patient's personality organization and psychological diagnosis. Mr. Spisak was aware that the results of this evaluation were not to be considered confidential and that a report would be prepared for the Court.

Assessment Procedures:

1. Bender-Gestalt with Recall
2. Minnesota Multiphasic Personality Inventory (MMPI)
3. Wechsler Adult Intelligence Scale - Revised (WAIS-R)
4. Rorschach Inkblot Test
5. McGarry-Lipsitt and Lelos Competency Screening Test

Remarks:

Mr. Spisak is a short, well-proportioned Caucasian male who appears his chronological age. His speech was entirely spontaneous, relevant and coherent, as well as presented at a normal rate. He was oriented to time, place and person and maintained good eye contact with me throughout the testing. Mr. Spisak demonstrated a wide range of affective expression, although his mood was not always appropriate to a given situation. Mr. Spisak seemed eager to undergo psychological assessment. Indeed, he seemed to enjoy "being in the limelight," letting me know that he appreciated our efforts and time in carefully evaluating his case. This sense of pleasure was intermingled with a haughty, contentious sense of self-inflation.

Mr. Spisak presented himself in a complex and contradictory fashion. At times he portrayed himself as a special, brilliant and creative thinker and leader who had not yet been recognized for his talents. At other times, he seemed like a loveable, lost little boy who only wished to be understood. He seemed very unsure of himself, constantly asking if I had similar experiences or could understand what he was going through--i.e., vivid and frightening dreams.

This uncertainty regarding his inner life was also seen in his idea that he was the reincarnation of Adolf Hitler. He proposed this belief tentatively, believing that I would view it as a "crazy thought." I hesitate to call this idea delusional because it was not a fixed belief unamenable to outside influences. Rather, it seems like a strong identificatory wish.

Mr. Spisak's approach to the test items varied with his ability to quickly solve the task. When he was able to speedily and accurately respond, he was

clearly pleased with himself and in a child-like manner exclaimed, "I did it." or "This one's easy." When the task was more challenging and he had some difficulty, his demeanor quickly changed to feeling that I had tricked him or was asking him to solve an impossible problems.

Mr. Spisak's MMPI profile is technically not interpretable due to the elevated validity scale. Such elevations may be caused by: 1. patient's random responses to the test; 2. inability to read or comprehend the test items; 3. outright malingering; 4. frank psychosis; 5. sense of panic leading to an exaggerated symptom picture and a plea for help. Inquiry revealed that Mr. Spisak comprehended the questions and did not randomly respond to tests. Moreover, he denied malingering or exaggeration of his symptoms. I had the patient retake the MMPI, asking him to respond in a more conservative manner. He produced a similar profile. It is my opinion that the profile though technically invalid, can be viewed as an exaggeration of a panicky patient's symptom complex, who does indeed manifest significant psychopathology. Mr. Spisak responded in an exaggerated, sarcastic and at times, inappropriate fashion to the competency screening test. On the individually administered tests, the WAIS-R, Bender-Gestalt with recall and Rorschach, Mr. Spisak's responses seemed less exaggerated and generally more controlled than the self-administered tests (MMPI and Competency Screening Tests). Perhaps my presence helped to reduce his inappropriateness and exaggeration of symptoms. With the exception of an MMPI taken approximately two years ago (profile presently unavailable), Mr. Spisak had no prior exposure to psychological testing. He is not taking any medication at the time of this evaluation. He performed the copying and

construction tasks with his right hand. It is my opinion that the individually administered tests are a valid and a reliable reflection of Mr. Spisak's current level of psychological functioning.

Test Results:

Mr. Spisak received a Verbal IQ of 94, a Performance IQ of 95 and a Full Scale IQ of 94, indicating that he is presently functioning in the average range of intellectual abilities. The Full Scale score likely underrepresents Mr. Spisak's potential level of intellectual functioning. At present, the patient's cognitive abilities seemed somewhat compromised by multiple ego weaknesses. There was moderate inter and intra test scatter suggesting that Mr. Spisak will evidence a good deal of variability both within and between various cognitive functions. The patient's best subtest score was in arithmetic ability and the analysis, organization, synthesis and reproduction of complex geometric designs. Conversely, Mr. Spisak's lowest scores were in short-term auditory memory for digits and social judgment. This latter weakness reflects the patient's difficulties in realistically gauging the consequences of his actions and self presentations. Mr. Spisak seems to misperceive the conventional manner in which the world is governed. Judgmental ability ranged from adequate to impulsive, unconventional and idiosyncratic. Thus, he is likely to behave in accordance with his own idiosyncratic, rebellious and quasipolitical ideals. His impulsivity and poor judgment may interfere somewhat with his perception of judicial procedure and his ability to modulate his behavior in a courtroom situation.

Further cognitive testing which involved the copying and the recall of complex geometric designs, revealed good planning and organizing ability. Mr.

Spisak's productions were free of rotations, perseverations and gross distortions. On the psychological tests administered, there was no evidence of neurological dysfunction on the cognitive level.

In structured situations, Mr. Spisak's thought processes ranged from logical, intact, efficient and adaptive to self-referential, loose, peculiar and strained. In less structured situations, his thinking was generally of poorer quality ranging from adequate to overfabulized, frankly paranoid, illogical and autistic. Paranoid obsessions were noted, focusing on hatred of Blacks, sadistic morbid fantasies of dead babies and identifications with powerful Nazi figures. Emotionally laden stimuli resulted in the disruption of logical thinking and the intrusion of fused primitive highly charged sexual and aggressive impulses. Additionally, abstract thinking ability was significantly and consistently compromised.

The patient's reality testing ability varied between adequate to grossly impaired. Mr. Spisak seemed unable to view the world in a neutral, matter-of-fact manner. While initially he might perceive a small portion of the world in a conventional fashion, he seemed driven to synthesize arbitrary relationships predicated on autistic logic that violated reality testing principles. As with his thought processes, emotionally laden stimuli created the greated disturbance in reality testing ability.

Affective regulation was the most compromised ego function. Mr. Spisak's threshold for affective stimulation seemed excessively low. In addition to being easily aroused, he seemed to have great difficulty modulating and adaptively expressing his emotions. Given his poor judgment,

thought disorder, tenuous reality testing and impaired affective regulation, Mr. Spisak seems prone to impulsive psychotic rages.

One can speculate that underlaying Mr. Spisak's multiple ego dysfunctions are struggles to control his massive primitive inner rage and to come to grips with his sexual identity confusion. Mr. Spisak projects his unacceptable sexual and aggressive impulses onto Blacks. He then perceives them as powerful, aggressive, evil and seductive. Consequently, Mr. Spisak feels hate, fear and envy for Blacks coupled with an inner sense of inadequacy, vulnerability and sexual confusion. His quasipolitical identifications serve as an obsessive-paranoid defense mechanism, whereby he wards off, albeit unsuccessfully, his projected aggression, inadequacy and sexual confusion.

In summary, Mr. Spisak is currently functioning in the average range of intellectual abilities. Psychological testing revealed multiple ego impairments in thought processes, judgment, reality testing and affective regulation. Mr. Spisak's psychological testing is not consistent with any one diagnostic category. While one could make a case for a chronic psychotic process, his ego dysfunctions are neither so pervasive nor profound, as to warrant such a severe diagnosis. Yet, there are indications that episodically Mr. Spisak's level of psychological functioning will deteriorate to the level of overt psychosis. A personality disorder diagnosis does not do justice to the severity of the patient's psychological condition and yet his record is not consistent with that of an overt psychotic disorder. The hallmark of Mr. Spisak's psychological testing is great variability in all ego functions. In any one situation, Mr. Spisak can appear to be either

functioning adequately or could possibly deteriorate into frank psychosis.

s/Stanley E. Althof, Ph.D.
Psychologist

SEA/kb
10-18-82

COURT PSYCHIATRIC CLINIC
Justice Center
Courts Tower – Sixth Floor
1200 Ontario Street
Cleveland, Ohio 44113

November 23, 1982

RE: FRANK SPISAK
DOCKET NOS. 176716, 176517 & 176651
REFERRED UNDER: 2945.39

Honorable James J. Sweeney
Courts Tower 18-C
Justice Center
Cleveland, Ohio

SUMMARY

This 31 year-old, divorced White man was referred for psychiatric evaluation under Ohio Revised Code 2945.39, Sanity at the Time of the Act. He is charged with three counts of Aggravated Murder, two counts of Attempted Murder, Aggravated Robbery and Receiving Stolen Property. This evaluation is based upon interviews conducted on October 12, 1982, October 14, 1982, November 9, 1982, November 16, 1982, and November 23, 1982. Each of the first four interviews exceeded two hours in length and the final interview lasted about one hour. In addition, I reviewed the following documents:

1. Detailed Social History prepared by Stephen D. Williger of the Court Psychiatric Clinic;

2. Psychological testing report prepared by Stanley Althof, Ph.D.;

3. Reports contained in the prosecutor's file;

4. Records from Cleveland Metropolitan General Hospital.

Mr. Spisak was informed that the information given to me in interviews would not be confidential and that a report of my evaluation would be sent to the Court.

Please refer to my competency report dated October 12, 1982, for details of past psychiatric history, drug history, and mental status examination.

Background data: My prior report states that, at times, Mr. Spisak felt like he was the reincarnation of Hitler. He gave the following additional material regarding this subject. He reported that he was quite active in the National Socialist White People's Party (NSWPP) before he was married. However, in 1972, he was rejected from the organization as a "trouble maker". After his divorce, he tried to re-join the Party, but he was not permitted to do so. He spoke of believing that he might eventually gain control of the group if they would accept him as a Hitler-like figure. He reports that intermittently, he had the feeling he was the reincarnation of Hitler, but sometimes he was uncertain. He believed that he was Hitler more frequently in the last three or four years; this coincided with regular use of marijuana.

He reports that he believed he could speed up the revolution by shooting Blacks and starting a racial war. He felt that he was in some way related to a movement which included the shooting of Blacks in Atlanta, Buffalo and other cities. He was not certain of the motives of the other persons who shot Blacks, but felt that they had a loose movement. He

felt that he was one who "doing rather than talking." After he began killing Blacks, he thought about forming a group. In order to be initiated, each new person would have to prove himself by killing a Black person with his gun. He stated that this would be a way to be sure that undercover police were kept out.

He was quite clear that he was not Hitler at this time, and reports that he was certain of it within a week after incarceration when marijuana was no longer available. He reports that marijuana enhanced his belief that he was Hitler.

He reports that he is heavily influenced by other people and physical objects, such as his Nazi memorabilia. Some days he had his Nazi flag (blood banner) up in his apartment, and other days he replaced it with his crucifix. "Being Frankie was being nobody, and being Hitler was being somebody." He reported that he would not feel like Hitler when the flag was down.

The defendant reports that since his wife left him in 1980, he had fantasies of killing her, his daughter and her entire family. Since the breakup of his marriage, he felt that the world seemed cold. He reports that he felt confused and miserable. In November, 1981, a woman named Alice moved into his building downstairs. He had her stay with him because he was lonely; together they were like a family.

The defendant reports that he frequented men's rooms at Cleveland State University for purposes of soliciting homosexual relationships since 1976. He reports being involved in both oral and anal sexual activities there. He viewed Cleveland as State University as "like a home to me", even though

he was not enrolled there.

Defendant's Account of Shooting Rev. Rickerson: Mr. Spisak reports that on February 1, 1982, he stayed home from work because he had a hangover and was concerned about his relationship with Alice. She was using alcohol and drugs excessively. He wanted her to either change, or leave his apartment. He stated that "she smoked a month's supply of dope in one afternoon". He decided he would stay home from work on February 1, 1982, and get things straightened out with her. However, she left, stating that she had to go someplace.

He decided to go to Cleveland State University where he sometimes went when he was in a bad mood.

He reports that he entered a men's room and began to masturbate in front of the mirror. If others came in, he sometimes ran to hide in a stall. He reports that he is unsure about whether he smoked marijuana that particular day. He states that Tim Sheehan, a well-dressed White man who looked like a professor, came in to the men's room. He had not seen Mr. Sheehan before. He reports that Mr. Sheehan touched his penis, but declined when the defendant offered to "blow him".

Mr. Spisak states that he left the men's room because he was unsure if Mr. Sheehan might call the police, and spent 45 to 60 minutes in the library nearby.

He returned to the men's room and noticed that someone was in "his" end stall. He states that he entered the stall next to that one. There was a large hole (18 to 24 inches in diameter) between the two stalls. He saw Rev. Rickerson sitting on the toilet masturbating. He reports that he did not like

him because he was Black. (He did have occasional homosexual and heterosexual relationships with Blacks, but preferred White male partners.)

He reports that Rev. Rickerson reached through the hole and touched the defendant's exposed leg. He states that he just wanted to get out of there because he felt repulsed by his approach. Mr. Spisak hoped that the Reverend would leave and "let me have my fun". He stated that he had a pistol with him that day, which he often carried. He states that he was mad at Rev. Rickerson for being in his stall and being "so obnoxious". He states that he was in such a bad mood that day that the slightest thing could have set him off. He had never seen Rev. Rickerson before. After Rev. Rickerson persisted in approaching him two or three times, he states that he shot him four times with his automatic .22 caliber pistol. He reports that he did not think he would die. He then ran out quickly because he was scared. He states that he would not have shot him if others had been in the bathroom for fear of being caught.

Mr. Spisak stated that something about shooting the gun made him feel good. "It almost brought a smile to my face. I was glad I shot the guy." He reported that once he found out he was dead, he did feel guilty. He reported that he would not have done the shooting if a policeman had been there or if a TV monitor had been there. He said, he "wanted to teach him a good lesson to keep away from me and that john."

He reported having no auditory hallucinations at the time of the shooting. He recalled thinking that Alice would be proud of him. When he did tell her, she was upset by it.

Defendant's Account of Shooting Mr. Hardaway: (June 4, 1982) In March, 1982, Mr. Spisak reports that he became better friends with Ron Reddish. The defendant and Ron spent considerable time discussing the need for violence to solve society's problems. The two discussed working together.

Mr. Spisak was planning to kill his former wife and her entire family. He reports that he was accumulating weapons to accomplish that goal, but wanted more "practice" before going after the family. He states that Ron talked about doing violence to Blacks and Jews.

Ron and the defendant drove around looking for a good place to accomplish their violence. They looked near the West Side Market, but found too much security there. They went to West 117th Street on June 4, 1982, and saw Mr. Hardaway going toward the Rapid Transit Station. They planned to shoot him there, but then he stopped in a bar. When Mr. Hardaway came out of the bar, Mr. Spisak followed him into the station. At the top of the stairs, he shot him with the same .22 that he used to shoot Rev. Rickerson. He recalls firing all eight shots into his chest and stomach, but reports that the paper said he was only hit with five shots. He states that Mr. Hardaway yelled and made "an awful screaming noise". He reports shooting him from about 15 to 20 feet away, looking at him in the face. He reports that there was never any intention to rob him.

After the shooting, all tension left him. He stated that it "felt good shooting the gun". He states that Ron gave him encouragement and that he and Ron went out to have a pizza to celebrate.

Mr. Spisak states that he reloaded the gun

and wanted to go and shoot another Black victim on the East side. He reports having 50 rounds with him. Ron said that one was enough that night. He and Ron argued about whether the .22 caliber gun was powerful enough to kill the victim. They returned to the scene to see if the body was there. They found only evidence of bloody bandages. They learned from reading in the paper that he had lived, but was in critical condition. Mr. Spisak stated that he was disappointed.

Ron reported it was the fault of the small caliber gun. Mr. Spisak took the gun to work in the machine shop and cut it up and ground it up so that it no longer existed. He states he did this because it was involved in two shootings. He reported feeling bad destroying it because it was his favorite gun, like a pet. He states that he felt worse after destroying his gun than he did after shooting his victims. He ordered a new gun just like it and paid $160 for it.

He does not recall having alcohol or marijuana on the day he shot Hr. Hardaway, but reports that he is not sure.

Defendant's Account of Shooting at Coletta Dart: Mr. Spisak reports that on August 4, 1982, he was laid off from work permanently. He was quite concerned about finances. He sold personal items, such as radios and stereo equipment for money.

He recalls that early in August, he was walking around the hallways at Cleveland State University. He states that he heard people making fun of the "White People's Party". They were suggesting that adherents to the party were "kooks". He recalls feeling indignant that such nasty things were being said because they "hit close to home". He states that Coletta came out of the room and went

down to the women's restroom. He states that he figured he would teach her a lesson. When she came out of the restroom, he stated that he planned to "slap the shit out of her and rob her". He states that she started to scream and kick. He pointed the gun at her, but she swung and ran down the hall "making me look stupid". He stated that he fired a shot at her. He does not recall having a chance to take anything from her. He stated that he suffered from no hallucinations on that occasion.

Defendant's Account of Shooting Mr. Sheehan – August 27, 1982: Mr. Spisak reports that he was becoming more desperate financially during the month of August. He was unsuccessful in finding a new job. He obtained small amounts of money from Black prostitutes, but was feeling pressed to pay his utilities and landlord. He felt "the whole world was coming down on my shoulders". He recalls that on Friday, August 27, 1982, he put in three job applications. He decided to stop at Cleveland State University in the afternoon to "check out the scene". He recalls being fed up with life and ready to "blow his own brains out".

He states that he saw Mr. Sheehan in the hall and recalled him from the incident the day that he shot Rev. Rickerson. He reports that Mr. Sheehan followed him into the third floor bathroom at Cleveland State. Mr. Spisak went into the last stall. Mr. Sheehan went to the urinal. The defendant reports that Mr. Sheehan stared at him when he went to the sink to wash his hands. Mr. Sheehan looked well dressed, so that the defendant believed he might have some money on him.

Mr. Spisak reports that he thought about pointing the gun at him and demanding money. He was hungry and had the thought of getting some

money so he could go to MacDonald's. He thought in his mind that it was not fair that this man had money and he did not. He knew that if he did take money from him and let him live, the victim might identify him in the future.

Mr. Spisak states that after he finished drying his hands, he took out his gun and shot him fast, aiming between his eyes. He reports that Mr. Sheehan "went right down without a sound". Mr. Spisak fired four shots. "Once I got started, I couldn't stop." "It made me feel good. The more I shot, the more I got addicted to it. I felt great."

He stayed around a minute to pick up his shell casings and a beeper that fell out of the victim's shirt pocket. He thought it looked neat and he knew the victim would have no more use for it. At home, when he found it did not play music and didn't say anything, he lost interest in it. He states that he looked in his wallet, but found no cash so he took only the change available in his pocket. He recalls getting out real quick because he did not want to get caught. His mood was that of being mad at the whole world so that he was "ready to kill anyone". He replied that he did not suffer from any hallucinations on that occasion.

Defendant's Account of Shooting Brian Warford – August 30, 1982: Mr. Spisak states that after his Friday shooting, Ron Reddish called and said that he was famous. Ron Reddish came over Saturday evening and the two decided to go out and do some shooting. They were looking for Black people to shoot. They drove around 93rd and Union. Ron Reddish was carrying one gun, and the defendant was carrying two guns and 50 rounds of ammunition. Mr. Spisak reports seeing two young Black men with a big radio, but they ran away before the defendant

had a chance to shoot them.

On Sunday, the defendant got together with Ron Reddish again. They spotted a couple of "potentials", but something interfered, such as cars being too close. They abandoned the plan rather than risk getting caught. Ron was more conservative and discouraged him from shooting unless the situation was safe.

Mr. Spisak states that he saw no future for himself and wanted to go out with a "blaze of glory". He said that killing people was "habit forming, I felt like I had to shoot someone everyday". He stated that if he did not, he felt like it was a "wasted day". Ron challenged his judgment, but the defendant pointed out to him that he had shot three people and Ron had shot none.

He reports that he dropped Ron off at about 1:00 a.m. and he still continued "hunting". He states he saw the kid (Brian Warford) at a bus stop near Cleveland State. He states he got out of the car and went to see what he was all about and whether he might be a mugger.

During one interview with me, he told me he had no hallucinations at the time of the killing. During a second interview, he stated that he heard a voice that sounded like Ron's saying, "do it, do it, do it". He stated that he didn't think he would get caught.

At 2:30 a.m., he asked the victim what time the bus came. He stated that since the victim didn't know, he concluded that he must be up to no good, so he shot him. He stated that it would have been sufficient reason to shoot him in an isolated spot even if he were not up to no good. He said that there was no one around, so it was "like a set up for me".

He stated that it was "a quick, clean, efficient kill. The more I did it, the better I got." He stated that it was "like I found my calling in life. I was really good at it." He said it "made me feel kind of proud".

He reported that he and Ron had discussed killing Jewish lawyers who were behind housing desegregation, after killing Blacks.

Defendant's Account of the Receiving Stolen Property charge: Mr. Spisak states that he found an orange plastic bank card two years ago, which had already expired. He stated that if it had still been good, he would have mailed it back to the bank. He also knew that a secret code was necessary to use it. He stated that he took it home with his stuff and planned to let his little girl play with it. He was subsequently told it was stolen five years earlier from a home. He states that he knew nothing about that.

Impression: Schizotypal personality.

Opinion: The first issue which must be addressed is whether Mr. Spisak had a mental disease or defect which would qualify him for the insanity defense. It is my opinion that Mr. Spisak suffered from a schizotypal personality, manifested by bizarre fantasies and preoccupations, ideas of reference, social isolation, recurrent illusions, vague metaphorical speech, suspiciousness and paranoid ideas, and hypersensitivity to criticism. This diagnosis is listed in the third edition of the Diagnostic and Statistical Manual of the American Psychiatric Association as a personality disorder. It is not considered a psychosis and does not cause him to be out of touch with reality. At times, Mr. Spisak appeared to believe that he was the reincarnation of Hitler. However, these ideas appeared to be vague,

uncertain and never fixed. They increased when he smoke marijuana. When he was free of marijuana after incarceration, he no longer had the idea at all. He also described being extremely influenced by his surroundings. So that if he were around the Nazi flag and other such materials, he would feel more like Hitler than if he were not.

The defendant acknowledged that he told a Ms. Studen that he loved Hitler in May, 1982. He explained that he loved Hitler like a father or God. He states that only sometimes, did he feel like he was actually Hitler.

It is my opinion that Mr. Spisak did not suffer from a mental disease or defect, which caused him to actually lose touch with reality and thus, qualify as a mental disease or defect for the purpose of the insanity defense. The only time in which he seemed to actually believe he was the reincarnation of Hitler, was when he was smoking marijuana and was thus voluntarily intoxicated. Nonetheless, since the trier of fact may conclude the Mr. Spisak's problems did rise to the level of a mental disease or defect, I will review each charge and give an opinion regarding his knowledge of the wrongfulness and ability to refrain.

Aggravated Murder of Rev. Rickerson: Mr. Spisak states that he was in a bad mood that day and that the slightest thing might set him off. His former wife reports that he had a bad temper and would strike out at her, at times, with small provocation. Mr. Spisak shot this victim because Rev. Rickerson was in his stall and was being "obnoxious" by making a homosexual pass toward him.

It is my opinion that Mr. Spisak knew the wrongfulness of shooting Rev. Rickerson and was able to refrain from shooting him. There is no

evidence of hallucinations which instructed him to do the shooting. He does not report feeling compelled to do it because he believed he was Hitler on that day. He states that he would not have done it had others been in the bathroom or a TV monitor been there, because he was fearful of being caught. It is my conclusion that even if Mr. Spisak were considered mentally ill on that day, no mental disease interfered with his knowledge of the wrongfulness of his act or his ability to refrain.

Attempted Aggravated Murder of Mr. Hardaway: Mr. Spisak states that he was looking for a Black man to shoot with his friend, Ron Reddish, on the day of this shooting. The shooting was consistent with the Nazi ideology shared by Mr. Spisak and Ron Reddish. There is no evidence of hallucinations, which compelled him to carry out this act or delusions which caused him not to know the wrongfulness of his act. It is my opinion that mental illness did not impair Mr. Spisak's reason so that he was unable to know either the wrongfulness of the shooting, nor was he unable to refrain from the shooting.

Attempted Murder of Coletta Dart: Mr. Spisak states that he shot at Coletta Dart because she did not cooperate in being beaten up and robbed. He did not want to look foolish by not at least firing at her. He was angry at her for saying uncomplimentary things about the White People's Party. In my opinion, he knew the wrongfulness of shooting at her and could have refrained. There is no evidence to suggest that he did not know the wrongfulness of robbing her or that he was unable to refrain from robbing her.

Aggravated Murder and Robbery of Mr. Sheehan: Mr. Spisak's motive in shooting Mr. Sheehan was

clearly robbery. He had no idealogical basis for shooting Mr. Sheehan as a Black man, since Mr. Sheehan was White. He stated that the only reason he did not rob Mr. Sheehan at gunpoint without killing him, was fear of being identified and caught. There were no hallucinations at the time of the shooting. It is my opinion that Mr. Spisak knew the wrongfulness of shooting Mr. Sheehan and could have refrained. It is also my opinion that he knew the wrongfulness of robbing him and could have refrained.

Aggravated Murder of Brian Warford: Mr. Spisak states that he killed Mr. Warford as part of his scheme to kill Blacks. He went out with Ron Reddish and with premeditation, looked for Black individuals who were in sufficiently isolated places to be killed, without resulting in the defendant's apprehension. In this one shooting alone, he does volunteer on one of two occasions, that he heard a voice saying "do it, do it, do it." This sounds to me like his own thoughts about whether or not to proceed at that time. In view of the absence of hallucinations at any other time in his life, I don't believe that these were true hallucinations. I do not believe that they represent a break with reality or psychosis. Mr. Spisak did refrain from shooting earlier Black victims the night before, because it could not conveniently be done. It is my opinion that Mr. Spisak knew the wrongfulness of shooting Mr. Warford and that he could have refrained from the shooting.

Receiving Stolen Property: Mr. Spisak gives the explanation that he found the credit card, which is the basis for this charge. There is no evidence of any delusional thinking or psychotic explanation for this charge. In my opinion, he knew the wrongfulness of

having someone else's credit card and could have refrained from not possessing it. He may or may not have made an honest mistake about the expiration date, but certainly, there is no psychiatric explanation for lack of intent.

In summary, it is my opinion that Mr. Spisak did not suffer from a mental disease or defect at the time of the commission of all of the above charges. Even if he is considered to have suffered from a mental disease or defect, it is my opinion that he knew the wrongfulness and was able to refrain from each of the acts with which he is charged.

s/Phillip J. Resnick, M.D.

PJR:ssp
11-23-82

SANDRA B. MCPHERSON, PH.D.
Clinical Psychologist
2140 Lee Road
Suite 215
Cleveland, Ohio 44118
(216) 371-9259

Psychological Report

Date of Report: February 10, 1983

Subject: Frank Spisak
Bd. June 6, 1951
Seen at Justice Center, January 6, 1983

Reason for Referral:

Mr. Spisak was seen at the request of his counsel in connection with charges of aggravated murder with specifications, attempted murder, aggravated robbery, and receiving stolen property. At issue was his mental status, whether he would be considered to be insane at the time of his acts, and whether he could be considered competent. The attorneys also wished a better understanding of the psychological factors underlying his acts.

Procedure:

Mr. Spisak was interviewed in depth regarding history and the crimes he is alleged to have committed, as well as with regard to his understanding of the justice system and his situation. He was administered a Minnesota Multiphasic Personality Inventory and a Rorschach. This data was evaluated scored, and interpreted on its own merits. Subsequently, the social history, psychological testing, and psychiatric assessments

carried out through the Court Clinic were obtained and integrated into the data obtained by this psychologist.

Interview: (summary)

Mr. Spisak was interviewed in depth regarding his history, the events which led to his arrest, and his current understanding of himself and his situation. He was friendly, cooperative, and understood well the role which this psychologist was taking including the difference between my function and that of the court psychologist or psychiatrist. He showed himself cognizant of his legal situation and knew how the legal system worked. He was more than willing to discuss his history and needed little or no prompting throughout the entire recitation. He was coherent, logical, extremely well organized, detail oriented, and chronologically accurate. Affect was appropriate for the social give and take aspects of this interchange with this examiner. However, his affect with respect to the content of the recitation was extremely inappropriate. Specifically, he showed absolutely no feeling and no emotion with regard to any of his victims.

Historical data was consistent with that obtained in previous examinations. He grew up in the Cleveland area. His family left the Buckeye neighborhood when racial change began occurring. There was a period of time in Parma and then in Middleburg Heights. Throughout his growing years, he felt he was an outcast whose only friends tended to be those viewed as defective by others. His involvement in Naziism further alienated him from others and others from him. He held a series of jobs which were not consistent with his potential, and he dropped out from CSU. His involvement with Naziism led to his being rejected by his family. Also,

he had made threatening statements towards family members at different points. His marriage was only marginally successful at first and ended in divorce. There was one child. The marriage was briefly re-established, but his wife's parents were strongly opposed to the union, viewing him as having extreme negative qualities. primary problem during these years involved his chaotic sexuality, including a period during which he attempted to go through the medical and psychological program involved in gender change. He was involved in various homosexual encounters, some of which were prostitution based.

His capacity to maintain control over fused impulses involving sexuality, aggression, and extreme attitudes of prejudice deteriorated over time. He formed a friendship with a man named Reddish whose philosophy of life involved nihilism and violence, and he began carrying a loaded weapon. His account of the various crimes involved a combination of bizarre qualities. There is lack of emotion and lack of empathic identification with the victim. No strong remorse is expressed or felt. He tends to rationalize the events and to find reasons in others' behavior, the society, or in notions that there was a racial war, as explaining why he behaved as he did. However, he enjoyed the act of killing, found it to be tension reducing, and was obsessed with guns and hearing about the deaths he caused. He exercised little effective attempt at self protection and tended to make gross mistakes of judgment in terms of trying to maintain himself and avoid incarceration. There is a paranoid flavor to thinking at times, but he was not impelled to his acts. Rather, he sought them out as the tensions built within, and as the excitement of what he referred to as "the hunt" contributed.

Test Results:

Results of psychological testing are completely consistent with the accounts obtained in the interview. His Rorschach is replete with indications of fused aggression and sexuality. There are indications of diffused sexual impulses involving homosexuality, heterosexuality, and sadomasochistic inclinations. He gives repeated references to anatomy, blood, death, and deterioration, far in excess of what could be considered remotely "normal." There is clear hostility toward women, and at the same time there is identification with women. That pattern is also found with respect to Blacks, where combined themes of hostility and identification are seen. While he shows the capacity to function in a reality based fashion, he also clearly shows himself to move as he increases in tension and sexualized impulses state to a point where he ignores reality as he seeks release. Also clear are themes of power and submission, again cast in sexual terms and images and involving diffuse identifications with varying roles. Both qualitative and quantitative aspects of the Rorschach show clear liability for loss of control over aggressive and homicidal impulses (W:D:Dr=9:16:3; W=9; π-4; Ecwt=6.5; 0=4+, 2- with both 0- in the context of FC; F=Ror% 74; m:2cwt=3:6.5; FC and CF involve 5 minus and 4 plus responses).

Results from the MMPI are entirely consistent with MMPI's obtained at the court in that an exaggerated picture emphasizing distress and pathological symptoms is seen. Mr. Spisak acknowledges the presence of delusions, hallucinations, depression, and agitation in an extreme degree. His responses were not randomly assigned, but the test taking set was clearly one of

presenting himself as having severe mental illness of a type more or less clearly perceived by the layman as involving gross deterioration of cognitive functioning. There is no presentation of unusual physical symptom picture. Some of the mental phenomena being reported may represent drug related experiences, some may be purposeful exaggeration, as a part of presenting himself as a mentally impaired person, and some of the profile clearly reflects his potential for disintegration into frankly psychotic [illegible] which would be anticipated on the basis of the projective responses.

Diagnosis:

Mr. Spisak's functioning at this time is nonpsychotic, although he has potential for deterioration under conditions of minimal stress of even in situations where there is lacking adequate external control. His ego integration is limited. Psychosexual functioning is diffuse and involves merge aggressive and sexual impulses with responding occurring in the context of homosexual, heterosexual, and sadomasochistic needs. It is likely that the act of killing quickly became attached to sexual arousal states, and thus the need to kill was enhanced by the buildup of sexualized tension and its subsequent release in the context of murder. Within the confines of the DSM III system, the diagnosis would be as follows:

Axis I: r/o transient Atypical Psychosis (298.90)
Axis II: Schizotypal Personality Disorder (301.22)
Borderline Personality Disorder (301.83)
Axis IV: Severity of Psychosocial Stressors–5, severe
Axis V: Highest level of Adaptive Function in Past Year-6, Very Poor.

Recommendations:

The implications of the above diagnostic formulations are severe. The degree of personality organization is minimal and the potential for decompensation into loss of control is high. The condition is of longstanding and there would much resistance to change. Prognosis for recovery is poor. Although there has been significant stress in his life, the deviations of his thinking and functioning are more the product of the longstanding defect of his mental condition rather than being reactive to stress and therefore likely to [illegible] with a benign environment. His level of risk for decompensation is high even with minimal stress, since the tensions and the abnormal passions characteristic of his thinking are engrained and spring from within himself. Under stress, he may be more likely to move into more psychotic thought pattern. In a controlled environment, his sexuality remains deviant and his lack of integration with a relatively fundamentalist religion which provides him with answers is in many ways no different than his attempt to find himself in the Nazi movement. He lacks any clear sense of himself and lacks internal control systems. He seeks definition and structure from the outside. Unfortunately, he does not remain under the control of these systems but tends to move into his own undifferentiated needstates and then become at risk for acting out in the environment.

As is clear from the foregoing, he showed a capacity to identify his situation, understand it and his prospects, he is able to work with his attorneys, and if accounts of the incidents do not meet the criteria for an insanity defense. Nonetheless, he is a significantly disturbed individual whose defect of mental state is pervasive, and was the general cause

of his acts. His distorted and sexualized responding is the foundation that leads to violence on a repeated basis.

s/Sandra B. McPherson, Ph.D.
Diplomate, Clinical Psychology

ADDENDUM
TO McPHERSON REPORT

Re: FRANK SPISAK, JR. 1982

DEFENDANT'S ACCOUNT: The defendant was seen for approximately three hours on 10-29-82. He initially, politely refused to talk about the crimes since his attorneys had not informed him of the new referral for sanity at the time of the act. He also initially refused to sign the consent form relating to Aggravated Murder with Specifications. Fifteen minutes later, however, the deputy informed this interviewer that the defendant wanted to talk. Upon entering the office, the defendant smilingly stated that he was ready to talk about the crimes and that his lawyer had told him that he would be interviewed by the Psychiatric Clinic staff. The defendant then stated that he would talk because he did not want his attorneys to be angry with him. After giving the below account, the defendant stated that he had given police substantially the same information.

The defendant reports that he was living on his own for approximately three years (since his wife was gone). He states, "it can be hard on a person." In October or November of 1981, a woman named Alice moved into the defendant's building with her six year-old son. The defendant states that the two liked each other "right off the bat". In November, she moved into the defendant's apartment with her son in an attempt "to be like a family". Alice, however, used alcohol and drugs to excess, and the defendant began to use these substances until it became "more of a problem." The defendant reports that his performance at work suffered because he could not keep up with the "fast living". The

relationship was starting to break up even though the defendant "was sick and tired of living alone". The defendant reports that the couple argued and fought verbally, not physically, with the defendant threatening to throw Alice out.

On February 2, 1982, the defendant stayed home from work because he had a hangover and was worried about "domestic problems". He reports that he stayed home from work intending to spend the day with Alice. He called in sick "though I wasn't physically sick". However, Alice "had other things to do" and she left the house with her son. The defendant was left at home alone so he decided to visit the library at Cleveland State University and "pass the time away". The defendant explained that he and Alice shared similar political beliefs, even to the point of Alice saying, "somebody should start shooting the niggers". The defendant states that although he was never a violent individual, he admitted that he had a "predisposition toward it".

Returning to the events of February 2, 1982, the defendant states that he went to the Cleveland State University library. After reading "for a while", he decided to go to the bathroom. When he entered the bathroom, the victim ("he was a Black male") was in the stall next to the defendant. The defendant states that he saw the victim masturbating, through a large hole in the stall. The defendant reports that the hole was made by homosexuals who put the hole there "for their own purposes". The defendant states that the victim was there "to have sex, I guess". Of the victim the defendant states, "there was something about this guy that repelled me". Although the defendant states that he attempted to ignore the victim, he found it hard to do so since the victim "wanted to do something to me". The

.efendant reports that he had been, "for a long time", in the habit of carrying a gun since he believed it to be his constitutional right (right to bear arms). The defendant states that he also carried a gun because of past attacks on him by Black people.

The defendant reports that the "obnoxious man was sitting next to me". The victim, Rev. Rickerson, said nothing to the defendant, but reached through the hole of the stall and, while "reaching for my penis", touched the defendant's leg. The defendant felt that he could either "run away in fear or do something about it". He states, "I decided to do something about it and I shot him." The defendant further indicates, "I don't think my intention was to kill him." The defendant states that he wanted to wound or scare the victim "at the worst". The defendant states, "I shot him several times and then I left."

The defendant went home that afternoon to wait for Alice. When Alice asked him what he had done during the day, the defendant told her, "I just shot a nigger". The defendant thought that Alice would be "proud" of him and the act would solve the problem with their relationship. However, according to the defendant, Alice said, "Are you crazy – don't even touch me." Alice left the house for a few hours and then returned. The defendant reports that he and Alice watched the evening news and saw the story about the murder.

The defendant states that he did not like the victim, Rev. Rickerson, because he was Black, a homosexual, obnoxious and wouldn't leave him alone. The defendant reports that at the time of the killing, he felt "confused". There was no indication that he was experiencing auditory or visual hallucinations at the time. The defendant states, "I

don't think I was hearing any voices or anything." The defendant recalls shooting the victim, then thinking that "Alice would be proud of me". Instead of making his life better, according to the defendant, the shooting "made things worse in my life – I had a fear of being caught". When the defendant was asked if he was sorry about the killing, he responded, "I don't think I felt any remorse – I don't remember crying over the guy." Although Alice did not approve of the defendant's actions, she did not turn him in to the police. After the killing, according to the defendant, Alice's girlfriends would smile and ask the defendant when he would shoot "another one ("nigger")".

Near the end of the interview, the defendant gave further information regarding the above killing and a killing which was to take place later. He stated that before he had entered the bathroom to find Rev. Rickerson, he entered on a prior occasion that day. While alone in the bathroom, he masturbated in front of a mirror. A male entered the bathroom and, according to the defendant, watched him as he continued to masturbate. The defendant states that the male approached him and the defendant asked him "if he wanted to do anything." The male said, "no". The defendant reports that the male who had watched him finish masturbating, was Timothy Sheehan. After this incident, the defendant returned to the library for a short time (approximately 45 minutes). He then went to the bathroom where he saw Rev. Rickerson. The defendant indicates that he had not thought of shooting Sheehan when the defendant was "caught masturbating". He states, however, that Rev. Rickerson was "doing the same thing I was doing". Months later, when Sheehan was killed, the defendant recognized him and wondered if Sheehan

remembered who he was. When the defendant saw Sheehan in the bathroom months later, Sheehan stared at the defendant and the defendant wondered if Sheehan wanted to have sex with him.

Approximately two weeks after Rev. Rickerson was killed, the defendant "kicked" Alice out of the house. He thereafter lived alone, except that his ex-wife, Laverne, would se him occasionally. He defendant reports that his job got better as he had no fear of being laid off. The defendant indicates that he had a lot to look forward to since Laverne was talking about getting together again. Therefore, the next few months were "good" for the defendant.

In March, 1982, the defendant and Ron Reddish became better friends. The defendant described Ron as an "official supporter of the White Power outfit here in Cleveland". The defendant, on the other hand, had been "kicked out" of the group a year and a half earlier. The defendant states, "Ron was a real proponent of violence" who was accumulating weapons and ammunition even though he was unemployed. The defendant and Ron would spend considerable time discussing "the need for violence to solve society's problems". The defendant states that he "opened up" and told Ron he had "shot a guy and got away with it". The two talked about "operating as a team".

The attempted murder of John Hardaway occurred on June 4, 1982, at approximately midnight. The defendant reports that he and Ron were riding in Ron's car when they saw Hardaway, a Black male, walking toward a Rapid Station. Ron and the defendant had been discussing "the problems of society". He states that he has forgotten who originated the idea, but both decided to shoot Hardaway. Both men were armed that night. The

defendant states, "it was like flipping a coin to decide who should do it". The defendant states that Ron decided not to go ahead with it since, at that time, he was only "thinking in terms of violence". The defendant does not recall if he was in a "bad mood" that night. He states that on a sunny day like the day of this interview, he would not "feel like shooting a stranger". At this point, the defendant digressed and spoke about not having been invited to his daughter's First Communion in May, 1982, at which time he had considered, for weeks after that, going to the ceremony and shooting people. Referring now to the night of the attempted murder of Hardaway, the defendant reports that he exited the car and walked to where Hardaway was waiting for a rapid. The defendant said nothing. He states, "I just went in there and shot him – I might have emptied the gun – then I ran out". When the defendant returned to the car, "Ron was laughing hysterically". Ron told the defendant that "it was the funniest thing he had ever seen in his whole life". Ron laughingly told the defendant, "Oh Frank, you're a killer – I love it". The defendant states that Ron's reaction was opposite of Alice's: he enjoyed being a spectator "or an accomplice" to the shooting. Ron told the defendant that they should do that regularly. The defendant reports that he and Reddish then ate a pizza and "celebrated it".

During the next few months, the defendant would drive around the Prospect area "and pick up hookers" since he was lonely. The defendant states that he generally picked up Black prostitutes and adds that he "started to pick up an affection for them". The defendant would bring the women to his home and "let them spend a few days with me". The defendant states, "the girls really did like me".

On August 4, 1982, the defendant was laid off "permanently". He began to worry about not having money. What little money he got was from prostitutes in return for his giving them rides to jobs. He also states that he borrowed money from his sisters and sold personal items such as, radios and stereo equipment for money. He states, "it was getting so bad I thought of selling my guns". The defendant reports that the things he and Ron discussed appeared to be coming true, that is, financial instability and race warfare. The defendant states, "it looked to me like my life was over – I was thinking of committing suicide." The defendant felt that he was a young man with experience and education, yet he was unable to find a job. Ron told the defendant that "a revolution was just around the corner" and the defendant believed him. The defendant enunciated his beliefs that there were too many people and insufficient jobs. He states that the "merciful thing is to put them out of their misery – including myself – that's probably what they're gong to do anyway after the trial".

On August 27, 1982, the defendant went to the Cleveland State University campus. He reports that there were very few people around as he walked around the campus area. He states, "it was like I had the whole place to myself." The defendant spotted Timothy Sheehan (victim) who followed him into the bathroom. The victim, according to the defendant, stood at the urinal and, after he was through urinating, "he stood there staring at me". The defendant reports that he became "very uncomfortable". The defendant thought that the victim "might be some kind of a pervert" who "might try to do something like the Reverend". The defendant noticed that Sheehan was a middle-aged man who was well dressed and remarked to this

interviewer that Sheehan "seemed to be out of place there". The defendant states, "it seemed to me the thing to do – to shoot him". The defendant related his belief that the victim "had everything and I had nothing." He stated that the contrasts were that the victim was well dressed while "my life was so miserable it wasn't worth living anymore". The defendant states, "I remember shooting him in the head, I think". The defendant recalls firing four shots. He then picked up the four shell casings. He also noticed a "beeper" which had fallen out of the victim's pocket and he took it home with him. The defendant states, "as far as I know it's all that I took off the guy – I don't remember disturbing anything else on the body."

On the night of the Sheehan killing, or the following night, the defendant and Ron drove around looking for "victims". They found no one on which to perform "an execution". The defendant states that by this time, he "had turned into a killer".

The defendant states that on August 30, 1982, he and Ron were walking or driving around the downtown area "looking for Blacks to shoot". They found no one and, at approximately 2:00 a.m., they split up. That this time, the defendant began to drive around alone and spotted the third victim, Brian Warford, alone at a bus stop. The defendant parked his car and returned to the bus stop on foot. The defendant states that he did not know if the victim was really waiting for a bus because it was usual for Black males to wait at bus stops in order to rob someone. Therefore, the defendant was "suspicious of Blacks waiting at bus stops late at night". The defendant walked to the bus stop and entered the shelter. He asked the victim what time a bus was to arrive, thinking that, if he was really

waiting for the bus to come, he would know the time. The victim responded that he did not know. Therefore, according to the defendant, he thought that the male was at the bus stop to rob someone. The defendant states that he then "looked both ways and then I shot him". He reports that he looked both ways to make sure nobody was around.

The defendant states that he then drove home. He reports that the next morning Ron called him and said, "You're famous – the incident was in all the papers." Ron told the defendant to "keep up the good work". The defendant states, "he was real proud of me".

Approximately one week later, the defendant was apprehended. He states, "At least I know I'm not going to kill anybody again".

Finally, the defendant states that he would regularly "hang out" in the bathrooms at Cleveland State University where he would "jack off" alone. Sometimes the defendant would have sex with other men in a CSU bathroom, either when he would be masturbating or when he saw other men masturbating. On one occasion, according to the defendant, he had sex in a bathroom with two other men.

At the end of the interview, the defendant was told he would be seen on Monday morning (the interview occurred on Friday morning). The defendant perked up and asked this interviewer if it was "for sure". The defendant related the above information in a matter-of-fact manner. He spoke at a normal rate and with a well-modulated voice. He related events clearly and in a general chronology, without frequent direction from the interviewer.

Mr. Spisak was interviewed again on

November 1, 1982. At that time, the defendant added the following piece of information. On the day after the shooting of Hardaway (attempted murder), there was no mention of the shooting in the newspaper. However, the defendant states that the newspaper discussed the abduction of two women in the Flats, and the murder of one of them by a Black male. The defendant thought that a "war" was on since a Black male had committed the violence against the two White women. He states that he felt justified in his shooting of Hardaway on the previous night. The defendant further described his belief, held at the time, that a "revolution" was nearer and he would have to defend himself. Finally, the above account of the crime was verified by the defendant and he agreed that the report, as set out above, is accurate. The defendant appeared to receive pleasure from discussing his account again and found ways to prolong the interview.

Regarding the charge of Receiving Stolen Property, the indictment indicates that the defendant is charged with having received, retained or disposed of a money card which belonged to Ervino Baatz. The defendant denied that he ever knowingly received stolen property. He reports that in either 1980 or 1981, while working at the Daniel Co., he saw a plastic money card on the bulletin board. The card had apparently been found by somebody, although no one knew to whom it belonged. The defendant reports that he noticed that the card had expired approximately two years earlier. He, therefore, took the card and gave it to his daughter, Sally, to play with. The defendant explained that the bank card was not usable because it had expired, and also because the user would need to know the secret identification number. The defendant states that if the card was still good, that

is, if it had not expired, he would have returned it to the bank. Finally, the statement given to police by Ervino Baatz, indicates that among items taken from his home on 9-3-77, was a National City Bank money card.

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March 1, 1983

Thomas M. Shaughnessy
Attorney at Law
11510 Buckeye Road
Cleveland, Ohio 44104

RE: SPISAK, Frank

Dear Mr. Shaughnessy,

Pursuant to your request, I saw your client, Frank Spisak, for an independent psychiatric evaluation on February 18, 1983. Mr. Spisak is referred in accordance with the provisions of Ohio Revised Code 2945.39 - Sanity at the Time of the Act. The defendant is currently confined to the Cuyahoga County Jail charged with aggravated murder, attempted murder, aggravated robbery and receiving stolen property.

The independent psychiatric examination consisted of a direct one to one clinical interview of two and one half hours duration. In addition, the following materials were reviewed:

1) The psychological report prepared by Sandra B. McPherson, Ph.D. dated February 10, 1983

2) Psychological evaluation by Stanley E. Althof,

Ph.D. dated September 30, 1982

3) Reports related to competency to stand trial prepared in the Court Psychiatric Clinic by Phillip J. Resnick, M.D.

4) The report regarding sanity at the time of the act dated November 23, 1982, also prepared by Phillip J. Resnick, M.D.

5) The Social History prepared in the Court Psychiatric Clinic by Stephen D. Williger and dated September 30, 1982

6) Outpatient clinical records from Cleveland Metropolitan General Hospital, cover letter dated November 3, 1982

The defendant was informed and understood that no doctor/patient confidentiality existed for purposes of the examination. The defendant further understood that I would be preparing a written report containing my opinions as to his sanity at the time of the act. He also understood that I might be called to give testimony during the sentencing portion of his trial.

SUMMARY: Details of the alleged incidents are given in both Dr. McPherson's and Dr. Resnick's reports. I carefully reviewed details of the alleged incidents with the defendant prior to reading the reports of either Dr. McPherson or Dr. Resnick. I then compared the information given directly to me by Mr. Spisak with the recounting of the incidents as given to previous examiners.

There are minor differences in the pretelling of the incidents but essentially the narratives are the same.

MENTAL STATUS EXAMINATION: The defendant was alert and oriented to person, place and time. He was carrying a Bible with him but made no specific references to religion. He was cooperative

throughout the interview and contributed information spontaneously. Verbally, he expressed concern regarding his current legal predicament but emotionally he was isolated. There was little emotional feeling conveyed either with respect to his current circumstances or the crimes for which he is charged. He did not show evidence of delusions or hallucinations. His overall stance was paranoid. Recent and remote memory were intact. There were no signs of organicity.

DIAGNOSTIC IMPRESSION: 1) Schizotypal personality disorder

OPINION: The defendant, Frank Spisak, demonstrates severe defects in his personality structure. He has always felt abused and hated by people and as a consequence, has identified with powerful figures, such as Hitler, in an attempt to increase his sense of self worth. He has severe conflicts regarding his sexual identity and his sexual impulses are fused and intermingled with aggressive impulses. He is generally suspicious of people.

Generally speaking, personality disorders are not considered to be mental disease or mental illness when being used in an insanity defense. However, it is my opinion that Mr. Spisak's personality deficits are of such severity that he can be considered to have a mental illness or mental disease. However, in carefully reviewing his mental state at the time of the alleged crimes, it is my opinion that he knew the wrongfulness of his acts and had the ability to refrain from the acts.

Sincerely,

s/ Kurt A. Bertschinger M.D.

KAB/dmf

OHIO DEPARTMENT OF MENTAL HEALTH
Dayton Mental Health Center
2611 Wayne Avenue
Dayton, Ohio 45420
(513) 258-0440

NARRATIVE SUMMARY

A. Identifying Information:

Name:	Frank G. Spisak, Jr.
Date of Birth:	REDACTED
County of Referral:	Cuyahoga
Date of Admission:	4/28/83
Hospital #:	65-15-52
Court Case #:	CR176517/CR176651/ CR176716
Social Security #:	REDACTED
Prosecuting Attorney:	Don Nugent Pat Cleary
Defense Attorney:	Tom Shaughnessy Jack Gardner
Charges:	Aggr. Murder w/specifications; Attempted Murder; Receiving Stolen Property

B. Court Referral Question:

Mr. Spisak was admitted to the Dayton Mental Health Center Forensic Unit by the Honorable James J. Sweeney of the Cuyahoga County Common Pleas Court pursuant to Section 2945.39 of the Ohio Revised Code for evaluation of his sanity at the time

of the alleged offenses. Mr. Spisak has been charged with Aggravated Murder with Specifications, Attempted Murder, and Receiving Stolen Property.

C. Psychosocial History: (Terry McDaniel, Social Worker)

Frank Spisak, Jr., was born on REDACTED in Cleveland Heights, Ohio as the eldest of three children born to the couple of Frank G. Spisak, Sr. and Irene (Petro) Spisak. He and his two younger sisters, Nadine and Sharon, were raised in the suburban areas of Parma Heights and Middleburg Heights in an intact, white, middle-class, catholic, family.

As a child, Frank was closer to his mother, because his father held two jobs and was home only on family-oriented holidays and vacation. Frank was described as a friendly well-mannered, intelligent child, who thrived on attention. He also enjoyed getting into mischief "without his mother knowing about it and would get a thrill anticipating the time she would discover his mischievous doings. It was almost a game to him. 'Let's fool Mom.'"

Frank indicates that his father is a 60 year old, retired factory worker with a 10th grade education. Frank described his father as "off in his own world". It is indicated that Frank and his father shared a love of music, and that interest formed the closest bond between them.

Frank's mother is described as a 52 year old housewife with a high school education. Frank describes his mother as the boss of the family, who has her own way of doing things. He feels that his father would be lost without her.

During Frank's growing up years, he indicated that

his mother was over-protective of him, because she was afraid that he might get hurt. He says that his eyesight was so bad that a blow to the head might have caused him to go blind. His mother allegedly would not allow him to play sports, and would make him sit on the porch with his sisters, so that they would not get dirty. For that reason, Frank was reportedly picked on by the other children, who often made fun of him and beat him up as well. Frank indicates that he spent his time as a child reading and watching T.V. However, his mother often objected to that, because she was afraid he was ruining his eyes. Frank states that his eyesight became so bad that he was removed from Gym class. Despite those problems, Frank stated that he did well in school. He reported attending several elementary schools because his family moved around quite a bit. He denied ever having been expelled or suspended from school, although he did mention having been sent to the principal's office at Middleburg Heights Junior High School because he was trying to start a Nazi club and had some of the other children goose-stepping in the hallways. In 1969, Frank reportedly graduated from Midpark High School in Middleburg Heights with good grades. He then attended Cleveland State University for one year from 1969-1970. During his freshman year, he continued his interest in Naziism and attempted to start a Nazi Party at the college, but feels that he was discriminated against in that regard by the administration.

When Frank began his second year of college, he was allegedly kicked out of his parents' home due to his involvement with the Nazi party. At that point in time, it was indicated that Frank began working as a stock boy in Kay's bookstore. He enjoyed that job, because he could read all the books he wanted,

particularly regarding the Nazi party, which he states has been his sole interest in life.

After working there for two years, Frank quit due to the low pay and obtained a job in a factory. He claimed to have been employed at Lenton Manufacturing Company, which makes metal stampings, for approximately six years, during which time he received on the job training as a machinist.

On 10/27/73, Frank married LaVerne Lampert, when they were both 21 years old. It was the first marriage for each. Neither partner brought any children with them from any previous relationships. One child resulted from their union. He name is Sally Ann Spisak, and she is nine years old. Frank describes his marriage as "pretty good", stating that his wife were "a lot alike" in that they had similar interests such as old-time rock and roll music and arts and crafts. However, he described his wife as overly possessive, stating that she complained, because she felt that he spent too much time going out with his friends.

There were also financial problems. Frank stated that the only person he could really talk to was his wife, but they eventually began leading separate lives, with more and more arguments and few common interests. As their marriage deteriorated, Frank began dressing up in his wife's clothes and going out, dressed as a woman. He eventually began dressing as a woman when he went to work. He wore makeup, carried a purse and insisted on using the women's restroom. Despite the protests of his employer, he continued in his dressing up behavior and was fired. In December of 1977, his wife left him and they were divorced [illegible] later.

He began outpatient psychiatric treatment in 1978, and planned to have a [illegible] change operation. As part of this plan, he participated in a gender identity group at the Cleveland Metropolitan General Hospital, where he received hormone pills and other treatment. However, after a year of posing as a woman, Frank changed his mind about the sex change and decided that he wanted his wife back. He got another job at Langenau Manufacturing, and worked for around a year (1970-1980). In 1980, he was hired at the Edward Daniel Company, and ran a screw machine there. This show of responsibility so impressed his ex-wife that they were remarried in March of 1980. However, she left him again four months later, because she felt that he was spending too much time and energy on the Nazi Party.

Then the local Nazi group he was part of kicked him out, saying that he was a traitor and a troublemaker. Despondent over those rejections, Frank attempted to lose himself in his work. However, business became slack and layoffs were threatened.

As business became worse, Frank bought more and more guns, thinking that he would need to protect himself from thieves within the decline of the economy. He was laid off from his job in August of 1982 and was arrested for three shootings in the Cleveland area in September of 1982.

Frank reportedly has a history of drug abuse. One of his sisters attempted to kill herself.

D. Psychological Data: (Richard Koerner, Psy.D., Psychology Assistant)

Mr. Spisak was admitted to DFU for evaluation of his sanity at the time of the act for three counts of Murder, two counts of Attempted Murder, and Receiving Stolen Property. His ward behavior has

been polite, appropriate and cooperative. No signs or symptoms of major mental illness were noted in his ward behavior.

Psychological testing indicated that he is functioning in the average to above-average range of intellectual functioning. His testing also suggested that he was admitting to exaggerated symptoms of mental illness. This was not consistent with either his ward or interview behavior and likely is the result of some rebelliousness or resistance to testing rather than malingering.

Mr. Spisak appears to be an emotionally stunted individual with a high need to feel in control and fear of inadequacy and vulnerability. He tends to view the world in an oversimplistic manner and he aligns himself with ideologies that legitimize his feelings of alienation and fear. He vacillates between identifying with groups that espouse these socially deviant beliefs and with being a loner. He has a very poorly formed concept of his identity as an adult. In general, his identification with deviant groups and researching beliefs that agree with his view of the world appear to sufficiently allow him to intellectually distance himself from his feelings of alienation, fear and inadequacy. However in stressful situations such as his divorce and loss of his job, his belief system is not adequate to shield him from the aforementioned emotional states. He apparently attempts to regain feelings of control and power through more intense violent fantasies and through acts of violence.

Mr. Spisak does not appear to have been suffering from a major mental illness at the time of his 3 counts of murder and two counts of attempted murder. His ability to appreciate the wrongfulness of these acts nor his ability to refrain from doing

them was not impaired. He was legally sane at the time of these offenses. Mr. Spisak would not discuss his charge of Receiving Stolen Property and no opinion on his sanity relevant to this offense could be made by this examiner.

E. Analysis:

Mr. Spisak seemed to have a relatively normal childhood. However, at the age of 10, his mother brought him and encyclopedia. He read a lot but was not very impressed.

At the age of 14, he read a book about Hitler. He liked him and became obsessed with thoughts that Hitler was a great man, etc. He wanted to join the Nazi Party but was too young at the time. In 1970 at Cleveland State University, he joined the Nazi Party and quit the Party in 1972. He rejoined the Nazi Party in 1979.

Mr. Spisak got married early in the 1970s. He had a good and normal relationship with his wife, however, he stated that she was disappointed because she felt that he was less interested in her than his books and the Nazi Party.

His mother was bossy and somewhat of a dictator. He used to see her as an image of Hitler. His father was a passive person. This situation probably affected the development of his gender identity. He did not want to be like his father. He wanted to be strong like his mother and be a leader. At the age of 20, he developed a feeling that he was lost, that he did not belong to the existing world (society) and asked himself "who am I?" Everything – people, shops, etc., looked strange to him.

At the age of 26, his Gender Identity disorder intensified and he developed homosexual tendencies.

For years he had had little tendency toward wearing female clothes. At the age of 26, he started to wear female clothing, sometimes wearing female clothing to work. This drew comments from the people he worked with and the disappointment of his supervisor. He was finally fired from his job because of this habit.

He began taking Estrogen (a female hormone) in 1977. In November of 1977, he began going to a Clinic in Cleveland with the intention of having a sex change operation. They continued him on Estrogen but decreased the dosage. He had a session every two weeks. He stopped going to the Clinic in September, 1978 and continued taking the hormone until December, 1978.

His wife did not approve of his tendencies and was disappointed. They separated in March, 1978. She returned to him in March of 1980 when he explained to her that he had improved and no longer wore female clothes. They were separated again in four months and they were divorced in 1981.

It is clear that the contrasting personalities of his parents as well as reading about Hitler resulted in the development of an Identity Disorder manifested by confusion about himself, his goals, sexual orientation, group loyalties, etc. [illegible] development of Gender Identity Disorders manifested by Transvestism and Transexualism.

Mental Status on Admission (4/28/83):

Mr. Spisak's only previous history of previous psychiatric treatment [illegible].

General Behavior and Appearance:

On admission and after, Mr. Spisak kept himself well-groomed and clean. He walked in a normal gait.

He speaks in a clear, slightly loud voice. He associated and socialized with other clients in a free and normal manner. Activity was appropriate. He watched T.V. sometimes, played pool and sometimes chatted with other clients. However, he liked to spend time in his room, reading or writing.

Mood: Neutral, happy occasionally. No depression was noted at any time.

Affect: Intact and appropriately shown.

Thought Process: Mr. Spisak did not show pathological manifestation in this area. He was always coherent and relevant. No blocking or hesitancy was noted, nor was looseness of associations or flight of ideas. Verbal productivity was appropriate.

Thought Contents: Mr. Spisak did not show delusions or suspiciousness or paranoid ideation, other than accusing her parents of being responsible of the breakup of his marriage. He denied hallucinations of any kind and also did not express psychosomatic symptoms of any kind. He expressed no concern of any kind about his case in the Court.

It seems that there is a factor of grandiosity and some kind of happiness regarding his actions. He justifies the shootings and expressed regret over being arrested before he killed more people.

Sensorium: Orientation: Well oriented to all spheres including the situation.

Memory: Good for remote and recent events.

Cognitive Function: good

Judgement: In regard to his behavior on the ward, he demonstrates good judgement. However, a few days after his admission, he started to aggravate

some black patients. In regard to his crime, his judgement is highly affected by his theories.

Insight: Present, in regard to his hospitalization, charges and legal procedures being taken against him. Also his Gender Identity Disorder and other problems.

G. Diagnosis:

Axis I 1. Identity Disorder (Adolescence onset and continued in adulthood) #313.82

2. Gender Identity Disorder

a. Transvestism #302.30
b. Transsexualism (heterosexual type) #302.53

3. Adult Antisocial Behavior #V71.01

Axis II Atypical Personality Disorder with grandiose and aggressive features #301.89

Axis III none

Axis IV Conjugal: Separation then divorce from wife, #A-6 Extreme

Axis V Very poor - #6

H. Discussion of the Incidents:

Information was obtained from Mr. Spisak.

1. Murder of a black man early in 1982:

After his wife obtained a divorce from him, Mr. Spisak was upset and decided to kill his parents and hers. He bought a gun and trained extensively in its use (he stated that he could shoot down a flying can). He waited for the suitable chance to put his plan into effect.

One day, he walked into a lavatory on the University of Cleveland campus. The wall between the stalls was damaged and there was a large hole in the wall, more than a foot in diameter. He observed a black man in the next stall who was sitting on the toilet, masturbating. He was very upset and according to Mr. Spisak, he impulsively pulled his gun and shot the black man in the lower abdomen.

2. Shooting of another black man, shortly after, the first incident.

Mr. Spisak was walking on the street. He saw a black man who resembled his first victim, and simply shot him.

3. Shooting of a young woman at the University of Cleveland:

Mr. Spisak, while in the area of the restrooms, saw a young woman walk out of the women's restroom. He approached her with the gun in his hand, grabbed her arm and asked her to go back into the bathroom with him. He stated that he wanted to have physical relations with her, but not necessarily rape her. The woman pushed him away, started screaming and ran away from him. He fired at her more than once with the gun, but missed her. He saw people approaching, put the gun in his pocket and walked away.

He commented on the woman's behavior, stating that it was unusual because he expected her to be frightened and submit to walking back into the restroom with him.

4. Shooting of an elderly white man:

Mr. Spisak was driving with a friend on the campus of the University of Cleveland. They stopped so he could use the restroom. He followed an elderly white man who resembled his father in law. He wanted to kill his father in law previous to this time. He shot the man and killed him. Mr. Spisak claimed that the man was carrying a pager which fell on the floor. Frank took the pager and left.

He stated that his friend was upset because the victim was white.

5. Shooting a young black man on the street:

Mr. Spisak was walking on the street around midnight or after. The street was quiet and there were no passersby. He spotted a young man at the bus stop and shot him. When asked by the examiner what the man had done to him to cause Mr. Spisak to shoot him, Mr. Spisak replied that the man was black and that he had decided to kill as many blacks as possible to make room for the white people.

He added that it was the same, for example, as the white settlers and the American Indians. Without the battles fought between the two groups and the killing of many Indians, the white people would not have a place to live. He stated that he felt the black people were trying to take over and they must be stopped and killed. He added that unfortunately he was arrested before he killed more blacks.

I. Conclusion:

Mr. Spisak developed Identity Disorders which affected his way of life and resulted in the development of social, occupational and marital problems. He was aware of that and he stopped wearing female clothing to get his wife back. He was also affected by his mother's strong personality and wanted to be like her, but was unable to achieve a "boss" position as she did. He tried to gain some strength by joining the Nazi Party, but this did not help him in his attempt. This failure aggravated him and he blamed others for his problems.

He decided to kill his father and his parents in law. He explained that he wanted to kill his in laws because he felt they were responsible for his divorce. He was not clear in explaining the reason he wanted to kill his father. It seems that he held his father responsible for his weakness as he used to see his father as a weak, passive person. To accomplish there killings, Mr. Spisak carried a gun after training extensively in its use. He had several chances to kill the three of them but never did.

At a later time, he adopted the plan to kill black people. To justify that, he adopted the theory that he wanted to make room for the white people. Although it might sound ridiculous, it became an established idea in his mind.

There is some question that the first shooting was impulsive. He was carrying a gun and had the intention of killing people. He knew what he was doing and had the capability to refrain from the acts, but chose not to refrain.

Mr. Spisak never lost touch with reality. He did not develop looseness of association, nor was he confused at any time.

I conclude that Mr. Spisak was sane at the time of all the shootings.

J. Recommendations:

Mr. Spisak was not given any medication during his stay at the Dayton Forensic Unit, as he had no need for any.

Mr. Spisak is concluded to be sane at the time of all the shootings. He has been returned to the court for further disposition.

Mr. Spisak was found to be not mentally ill as defined by the Ohio Revised Code. He has a personality disorder and identity disorders.

K. Prognosis:

Poor to guarded.

s/S.M. Samy, M.D.
Staff Psychiatrist
Date Signed: 5/27/83

SMS:kcm
typed 5-26-83

OSCAR B. MARKEY, M.D. RICHARD B. MARKEY, M.D.
1400 Cedar Road, Suite 390
University Heights, Ohio 44121
—
216-291-4767

June 17, 1983

Mr. John N. Gardner
1276 W. 3rd. Street
Suite 3409
Marion Building
Cleveland, Ohio 44113

Dear Mr. Gardner:

My involvement with Frank Spisak, your client, began on April 19 at the Justice Center. I had a second session with Mr. Spisak on April 23, a third session on June 3rd. and a fourth on June 9th of this year. Through the cooperation of the Psychiatric Clinic at the Justice Center, I was able to review the reports prepared by Dr. Resnick and reports sent by Dr. Bertchinger, Psychiatrist, and Dr. McPherson, Psychologist. Dr. McPherson's examination included an MMPI and a Rorschach, which is an unstructured set of images, reflecting inner, less conscious feelings and thoughts.

Mr. Spisak had been described as cooperative, candid and readily able to record the incidents which resulted in bringing him to the court attention. The recorded impression essentially centered on a diagnosis of a serious Personality Disorder without Psychosis. The specific diagnosis was Schizo-Typal Personality Disorder.

In my first contact with Spisak, he immediately stated that he did not wish to talk with me. My efforts to get him to recall and describe the incidents associated with aggravated murder or attempted aggravated murder were ineffectual. However, his communications were seen as quite significant. He described himself as having had experiences in the II World War and having been much impressed with Hitler's role in that war. In that session and in later sessions, his references to Hitler were constantly filled with admiration and trust. He believes, for example, that Hitler is alive and could be elected president of the U.S., that he represents the primary defense against what Spisak believes is a Soviet America.

Each time that I tried to get him to talk about the crimes for which he is charged, he was elusive and silent. In the final session, however, he added that even if he were to talk about what happened, it would make no difference.

He appears convinced that there are evil forces which he designates "The System" that are presently evident in the Soviet threat and resemble what happened in the beginnings of Christianity and Christ's death and resurrection. His manner of dealing with me was far more involved in this ideation than in the fact that he is incarcerated for a capital offence and about to go to trial.

In his reaction to each of the efforts to attack his victims, he felt justified and showed or expressed no remorse. His emotional display resulted from fear and anger at the time of these assaults, but he showed or expressed no finer nuances of feeling as described by the Psychiatrists and the Psychologist.

It is significant that he asked for an examination at the State Hospital in Dayton and that he had great difficulty adjusting there. He complained of the fact that the doors were always open there and that he might be attacked by the "crazy" patients. To defend himself, he placed a heavy chair against the door every night. The staff people there always defended those who started fights with him because they tended to forgive "crazy" people, but not him. He was relieved when he was told that he was to return to the Justice Center, but he doesn't like it here either because of the evil "system".

I learned very little about his family life and his marriage. He pretends to have no interest in his ex-wife and daughter or his family. He was the first of three children and is now 32. I learned from Dr. Resnick's record that he had been rejected by his classmates in High School because of his contentious involvement with Neo-Nazism. At one time, indicating he still believes in that system, he referred to Rudolph Hess in Hess's effort to make peace with England in order to prevent a Soviet take over of the world.

The diagnostic formulation centers on what is obviously a Schizo-Typal Personality Disorder. The three earlier examiners I have referred to were convinced that he knew what he was doing and that he was not psychotic at the time of the assaults. I think that his conscious guilt feelings may have been relieved by his early acknowledgement of his pathological behavior and that he may have even enjoyed telling about them. By the time I saw him, months after his arrest and detention, he had apparently been in long rumination about his efforts to make the world safe for those who were essentially white and Christian. He aimed to impress me with

his higher ethical and religious beliefs. I have learned, though not from him, that he was involved in deviant sexual activity, as suggested by his frequent visits to the male lavatories at C.S.U. He saw himself as judge and executioner in killing Reverend Rickerson because of the latter's homosexual passes. The record also reveals that he sought Gender transfer once at W.R.U. because he wanted to become a woman, a sign of doubts about his own masculinity.

I wish to refer also to Dr. Bertchinger's examination, February 18, 1983, in which the diagnosis of Personality Disorder was supported. However, he said that Spisak had severe defects in personality structure which "equate mental illness." Dr. McPherson, the Psychologist, referred to "Inappropriate Affect," I.E. "no feeling for his victims" and to the fact that his capacity to control confused impulses caused extreme prejudices, sex aggression and absence of remorse. She particularly referred to the Rorschach protocol as filled with references to anatomy, blood deterioration and death, with hostility toward and identification with women.

In my diagnostic formulation, I recall the earlier diagnosis of "Psychopathic Personality" as described in Hinsie and Shatsky's Psychiatric dictionary in 1940. We now group them as various types of "Personality Disorder." In the Hinsie-Shatsky definition "many anomalies of character (appear) normal to the (disordered) individual," who exhibits peculiarities often seen in "borderline conditions." They may appear "normal" much of the time, sometimes with superficial anxiety and sometimes with a break down in a "reactive psychosis," usually short-lived.

I believe Spisak is in a latent psychosis (grandiose, paranoid, lacking in finer feelings, etc.) and that he was unable to control his impulses to assault, though he was at the time, aware of it's being socially wrong. These impulses have been chronically present for years, at least from the onset of puberty. The psychological protocol. especially in the Rorschach responses, suggests an underlying psychotic potential.

On the basis of current DSM 111 (Diagnostic Statistical Manual), I wish to record the following:

AXIS II - Schizotypal Personality Disorder

AXIS I - Atypical Psychotic Disorder (latent)

AXIS III - No Physical Causes Revealed

AXIS IV - Moderately Severe Pre-Morbid Psychosexual Stress (Home, School, Social)

AXIS V - Level of Adaptive Functioning in Past Year, Poor

Sincerely yours,

s/Oscar B. Markey, M.D.

OBM:cly

PETITIONER'S BRIEF

131

No. 08-724

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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OPINIONS BELOW

The Sixth Circuit's opinion, *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), is reproduced at Pet. App. 24a-94a. This Court's order granting the Warden's earlier petition for writ of certiorari, vacating the Sixth Circuit's judgment, and remanding, *Hudson v. Spisak*, 128 S. Ct. 373 (2007), is reproduced at Pet. App. 21a. The Sixth Circuit's order reinstating its original opinion is reproduced at Pet. App. 2a-11a. The United States District Court for the Northern District of Ohio's opinion and order is reproduced at Pet. App. 95a-300a. The Ohio Supreme Court's opinion in *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988), affirming Spisak's conviction and sentence, is reproduced at Pet. App. 301a-311a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's petition for rehearing on July 28, 2008. Pet. App. 1a. Justice Stevens extended the time period to file a petition for writ of certiorari. The Warden filed his petition on December 1, 2008, invoking the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the Warden's petition on February 23, 2009. *Smith v. Spisak*, 129 S. Ct. 1319 (2009) (No. 08-724).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides, in relevant part: "[N]or [shall] cruel and unusual punishments [be] inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

INTRODUCTION

At trial for a series of murders on a college campus, Respondent Frank G. Spisak, Jr., proudly testified at length as to his neo-Nazi beliefs and told the jury that those beliefs had motivated the murders. The jury convicted him and recommended a sentence of death, which the Ohio trial court imposed.

The Sixth Circuit held that Spisak's death sentence is invalid for two reasons: (1) because the jury instructions at the penalty phase violated *Mills v. Maryland*, 486 U.S. 367 (1988); and (2) because the penalty-phase closing argument delivered by Spisak's counsel was constitutionally ineffective. Neither ground, however, supports habeas relief in this case. The jury instructions at issue are nothing like the defective instructions in *Mills*, because the jury was told to consider all relevant mitigating factors. It was never instructed to make specific findings as to mitigators, let alone to exclude any mitigating factors on which it could not agree. And counsel's closing argument at the penalty phase was neither deficient (because he reasonably advanced a theme of mental illness) nor prejudicial (because any error he might have made could not have affected the outcome).

Spisak's claims for relief have even less merit when viewed through the deferential lens of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214. Because the Ohio Supreme Court reasonably rejected Spisak's jury-instruction and ineffective-assistance theories, this Court should reverse the Sixth Circuit's grant of the writ and reinstate Spisak's sentence.

STATEMENT OF THE CASE

A. A jury convicted Spisak of murder and recommended a sentence of death, which the trial court accepted.

Respondent Frank G. Spisak, Jr. killed Horace T. Rickerson, Timothy Sheehan, and Brian Warford in a series of shootings at Cleveland State University in 1982. Pet. App. 29a-31a. During the same spree, Spisak also shot at John Hardaway and Coletta Dartt. Hardaway was shot seven times but survived and identified Spisak as the shooter. Pet. App. 29a.

After his arrest, Spisak confessed to the five shootings. Pet. App. 364a-370a. He said that his actions were motivated by his hatred of gay people, blacks, and Jews, and he specifically targeted the campus of Cleveland State University. Pet. App. 365a-370a. Ballistics tests later confirmed Spisak's role in the murders. Pet. App. 303a.

At trial, instead of contesting Spisak's guilt, the defense attempted to demonstrate that he was legally insane. Spisak took the stand for several days, explaining the origins and scope of his Nazi beliefs; his pride in the murders of Rickerson, Sheehan, and Warford; and his desire to continue his homicidal conduct. J.A. 3-453. The defense also offered the testimony of Dr. Oscar Markey, who gave contradictory testimony concerning whether Spisak was mentally ill at the time of the crimes. The trial court ultimately struck Dr. Markey's testimony, Pet. App. 43a, and refused to instruct the jury on insanity, Pet. App. 53a-54a. The jury returned a guilty verdict on, among other charges, four counts of

aggravated murder with nineteen death specifications. Pet. App. 26a-27a; J.A. 643.

At the penalty phase, the defense presented expert testimony that Spisak was suffering from a mental illness—a condition that mitigated his culpability. A clinical psychologist, Sandra B. McPherson, testified that Spisak suffered from schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking, gender identification conflict, and emotional instability, and that these defects substantially impaired Spisak's capacity to conform his conduct to the law. J.A. 460-86. A psychiatrist, Kurt A. Bertschinger, similarly testified that Spisak suffered from schizotypal personality disorder, which impaired his ability to adhere to the requirements of the law. J.A. 487-551. Finally, Dr. Markey again testified, stating that he essentially agreed with the psychiatric diagnosis. J.A. 552-624.

After the close of the evidence, Spisak's counsel acknowledged the brutality of Spisak's murders in vivid detail in his closing argument. See, e.g., Pet. App. 335a ("And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live . . . ."). He also referred to Spisak's Nazi allegiance and bigoted views as "misguided," "sick," and "twisted." Pet. App. 336a-337a. Counsel then conceded that Spisak was not deserving of sympathy because he had no "good deeds" or "good thoughts," and that his beliefs are "never going to be any different." Pet. App. 338a-339a. He nevertheless argued that Spisak's mental illness was a mitigating factor that the jury should consider. Pet. App. 341a-

354a. While "not insane," counsel asserted, Spisak was sufficiently "sick and demented so that the ability to intend is substantially reduced," Pet. App. 341a—an argument that he supported with references to the experts' testimony, Pet. App. 342a-343a, 353a-354a. Counsel concluded by telling the jurors that he was proud of them for doing their duty, whatever they decided. Pet. App. 359a-360a.

In its sentencing instructions, the trial court explained to the jury that the State had "the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the [sentence] of death." Pet. App. 318a. The court further instructed that "to outweigh means to weigh more than, to be more important than," and that "[t]he existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors." *Id.* The aggravating circumstances, the court explained, were the death specifications on which the jury convicted Spisak during the guilt phase. Pet. App. 319a-323a.

The court then stated that "[m]itigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment." Pet. App. 323a. It added that mental illness was a mitigating factor: "[A]t the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to

conform his conduct to the requirements of the law." *Id.* The court also instructed the jury that it could find other mitigating factors—"the history, character and background of the offender," as well as "any other factors[] that are relevant to the issue of whether the defendant should be sentenced to death." *Id.* The court did not instruct the jurors that they needed to reach a unanimous conclusion as to the presence or absence of any particular mitigating factor.

The court then summarized the jury's duty under Ohio law:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine whether, beyond a reasonable doubt, the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case.
>
> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstance in each separate count outweighs the mitigating factors, then you must return that finding to the Court.
>
> I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence

> of death be imposed upon the defendant, Frank G. Spisak, Jr.
>
> A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

Pet. App. 323a-324a.

The trial court then discussed in detail the verdict forms that would be given to the jury. The first form stated,

> We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.

> We the jury recommend that the sentence of death be imposed . . . .

Pet. App. 325a. The court noted that "there [wa]s a spot for twelve signatures" at the bottom of the form, and that "[a]ll twelve of [the jurors would] sign it if that [wa]s [their] verdict." *Id.*

The second form similarly stated,

> We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving [the life sentence selected by the jury].

Pet. App. 325a-326a. The trial court noted that "again, all twelve of [the jurors] must sign whatever verdict it is you arrive at." Pet. App. 326a.

After deliberations, the jury recommended a sentence of death, J.A. 643, which the trial court accepted, J.A. 648-49.

B. The Ohio Supreme Court rejected Spisak's jury instruction and ineffective assistance of counsel claims on their merits.

On direct review, the Ohio court of appeals vacated one of the four aggravated murder convictions and the accompanying specifications, and

it affirmed the remainder of Spisak's convictions. Pet. App. 97a. Spisak obtained new counsel and moved for a second round of review before the Ohio court of appeals, which the Ohio Supreme Court granted. The Ohio appeals court again affirmed Spisak's convictions. Pet. App. 98a-99a.

On appeal, the Ohio Supreme Court reviewed and rejected all of Spisak's sixty-four errors, including his claim that "[j]ury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment" under the United States and Ohio Constitutions, and his claim that he was denied effective assistance of counsel at the penalty phase of his trial. Pet. App. 113a-114a, 306a. The court noted that it had rejected the same jury-instruction claim in other cases. Pet. App. 306a. It further concluded that Spisak's ineffective assistance claim was not well taken in light of numerous authorities, including *Strickland v. Washington*, 466 U.S. 668 (1984). Pet. App. 307a.

This Court denied review of the Ohio Supreme Court's decision. *Spisak v. Ohio*, 489 U.S. 1071 (1989).

C. The federal district court denied Spisak's habeas petition.

After unsuccessfully petitioning the Ohio courts for post-conviction relief, Pet. App. 116a, 130a, Spisak sought habeas relief in federal court. The district court denied Spisak petition on all thirty-three grounds. Pet. App. 299a. It specifically rejected a challenge to the trial court's sentencing-phase instructions. Spisak had argued that the trial

court erred by instructing the jury that its sentence must be unanimous without also explaining the consequences of the jury's inability to reach unanimity. Pet. App. 183a-188a. The district court rejected that claim under *Jones v. United States*, 527 U.S. 373, 381-82 (1999), which held that the failure to instruct on the consequence of jury deadlock does not give rise to a cognizable constitutional claim. Pet. App. 187a.

The district court then noted the possible applicability of the Sixth Circuit's decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). In *Davis*, the Sixth Circuit held that an instruction requiring a capital jury to "first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills* [*v. Maryland*, 486 U.S. 367 (1988)]." 318 F.3d at 689. Observing that *Davis* conflicted with other Sixth Circuit jury-instruction decisions, the district court declined to address whether Spisak's sentence was unconstitutional under *Davis*. The court specifically noted that Spisak failed to allege that the instructions in his case precluded the jury from considering mitigating evidence, and that his pleadings did not even cite *Mills*. Pet. App. 188a-189a.

The district court next rejected Spisak's claim that defense counsel's closing argument was constitutionally ineffective, finding that the alleged errors "can easily be attributed to a trial strategy." Pet. App. 199a. Specifically, the court found that defense counsel's remarks were part of a strategy to ingratiate himself with the jury, to blunt the

prosecutor's depiction of the murders, and to show that Spisak's mental defect was a mitigating factor. Pet. App. 199a-201a. Finally, the district court concluded that "[e]ven assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior," because there is no reasonable probability that the jury would have voted for a life sentence had counsel portrayed Spisak with more sympathy, given the "heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of the evidence." Pet. App. 203a-204a.

D. The Sixth Circuit reversed the district court and granted habeas relief as to Spisak's sentence.

The Sixth Circuit reversed the district court and vacated Spisak's death sentence. The court first concluded that the jury's sentencing instructions were improper under *Mills v. Maryland* (as interpreted in *Davis*, 318 F.3d at 689-90), because (1) they did not explicitly tell jurors that they need not unanimously find mitigating factors; (2) they required all twelve jurors to sign the verdict form indicating that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt; and (3) they did not inform the jurors that they need not unanimously reject a death sentence before imposing a life sentence. Pet. App. 71a-76a.

The Sixth Circuit also found that counsel breached his duty of loyalty to Spisak by making only a "limited effort" to argue for a life sentence during his closing argument, by "rambling" on about irrelevant matters, by suggesting that a verdict of

death would be acceptable, and by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." Pet. App. 62a-65a. The Sixth Circuit concluded: "Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ." Pet. App. 67a.

E. On this Court's remand, the Sixth Circuit reinstated its original opinion.

The Warden filed a petition for writ of certiorari. The Court granted the petition, vacated the Sixth Circuit's judgment, and remanded the case for further consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), and *Schriro v. Landrigan*, 550 U.S. 465 (2007). *Hudson v. Spisak*, 128 S. Ct. 373 (2007), reproduced at Pet. App. 21a. Without further briefing by the parties, the Sixth Circuit issued a four-page order reinstating its original opinion. Pet. App. 12a. After the Warden filed a petition for rehearing and suggestion for rehearing en banc, the court issued an amended order that again reinstated its original opinion. Pet. App. 2a. The Sixth Circuit later denied en banc review. Pet. App. 1a.

SUMMARY OF ARGUMENT

Spisak is not entitled to the habeas writ under either of his theories—that the penalty-phase jury instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), or that trial counsel's closing argument was constitutionally ineffective.

First, the instructions in this case were fully consistent with the Eighth Amendment. Unlike in *Mills*, where the jury was instructed to find unanimously the presence or absence of each mitigating factor, the jury here was not directed to enter any findings as to particular mitigating factors. Instead, the trial court told the jury to consider all relevant mitigating evidence and to balance the mitigating factors against the aggravating circumstances. The instructions therefore provided the individualized sentencing determination that the Eighth Amendment demands.

The Sixth Circuit identified no sound basis for invalidating the instructions under *Mills*. Nothing about either the instructions or the verdict form implied that unanimous agreement was required as to mitigating factors. Reasonable jurors would have understood that the instructions' silence on that point meant that the jury need not reach unanimity on the mitigating factors. And the Sixth Circuit's prohibition on so-called "acquittal-first" instructions—that is, instructions that require the jury to determine unanimously whether a death sentence is appropriate before it may consider a life sentence—is misplaced both because these instructions did not require an "acquittal first," and because such an instruction would not run afoul of *Mills*.

Second, trial counsel's penalty-phase closing argument was neither deficient nor prejudicial under the two-pronged analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). It was not deficient because counsel reasonably emphasized Spisak's mental defects as a mitigating factor and bolstered his own credibility with the jurors by acknowledging his client's offensive views. And it was not prejudicial because nothing defense counsel said in summation could have affected the minds of jurors who had sat through a lengthy trial and heard Spisak's own chilling, hate-filled testimony.

It was not without reason that this Court two years ago remanded this case to the Sixth Circuit in light of two recent AEDPA decisions—*Schriro v. Landrigan*, 550 U.S. 465 (2007), and *Carey v. Musladin*, 549 U.S. 70 (2006). But the Sixth Circuit's readings of *Landrigan* and *Musladin* on remand were as parsimonious as its readings of *Mills* and *Strickland* were capacious. As should have been clear from this Court's remand order, AEDPA required a different approach: deference to the Ohio Supreme Court's reasonable judgment in rejecting Spisak's jury-instruction and ineffective-assistance claims on direct review. This Court accordingly should reverse the Sixth Circuit's grant of the writ.

ARGUMENT

A. The jury instructions in this case were consistent with the Eighth Amendment.

The point of *Mills v. Maryland*, 486 U.S. 367 (1988), is to allow the jury to give effect to all relevant mitigating evidence. The Eighth Amendment requires that the sentencer in a capital case undertake an individualized assessment of the particular case. See *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). Specifically, the sentencer must be permitted to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). To that end, *Mills* invalidated penalty-phase jury instructions that suggested that the jury was required unanimously to agree on particular mitigating factors before it could give any effect to those factors. 486 U.S. at 384. Put simply, *Mills* requires that each juror be able to make his or her own decision regarding mitigating circumstances.

The penalty-phase instructions in this case did everything that *Mills* requires: They allowed each juror to consider and give effect to all relevant mitigating evidence. To be sure, the instructions required juror unanimity on the ultimate question—whether aggravating circumstances outweighed any mitigating factors by proof beyond a reasonable doubt—but this type of unanimity, unlike the mitigating-factor unanimity at issue in *Mills*, is constitutionally permissible. None of the Sixth Circuit's theories for invalidating the instructions

finds support in this Court's Eighth Amendment jurisprudence. And none of those theories was clearly established law when the Ohio Supreme Court affirmed Spisak's conviction. See 28 U.S.C. § 2254(d)(1). AEDPA therefore required the Sixth Circuit to defer to the state court's reasonable adjudication of Spisak's jury-instruction claim.

1. The instructions were valid under *Mills v. Maryland*.

This Court's decision in *Mills* followed from the Eighth Amendment's requirement that capital sentencers be able to consider and give effect to all relevant mitigating evidence. See *Mills*, 486 U.S. at 374-75; see also *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). That requirement was satisfied in Spisak's case: Spisak was fully able to present his case for mitigation, and the instructions gave the jurors ample opportunity to consider his evidence.

To begin with, the jury instructions in this case were invalid only if a "reasonable likelihood" existed that the jury applied them "in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990). "[A] capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility" that the instruction "impermissibly inhibited" the jury's deliberation. *Id.* More specifically, because Spisak's objection arises under *Mills*, the instructions here were invalid only if it was reasonably probable that they produced the

same misapprehension that was likely in *Mills*.[1] And they did not.

The problem in *Mills* was a product of both the jury instructions and the verdict form. The trial court's instructions told the jurors to answer "no" to a mitigating factor whenever they did not unanimously answer "yes," while the verdict form required the jury to write a collective "yes" or "no" next to each mitigating factor. 486 U.S. at 378. Under a likely reading of the instructions and verdict form, the jurors were "not free . . . to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances." *Id.* at 380. Instead, they could "weigh only those mitigating circumstances marked 'yes.' Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror." *Id.* The Court concluded that a substantial probability existed that "reasonable jurors, upon receiving the judge's instructions in this case, and in

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[1] The Sixth Circuit looked not only to *Mills* but also to *McKoy v. North Carolina*, 494 U.S. 433 (1990). Pet. App. 72a. Under AEDPA, however, a court sitting in federal habeas may consider only law that was clearly established when the state-court conviction became final. See *Musladin*, 549 U.S. at 74 ("'[C]learly established Federal law' in § 2254(d)(1) 'refers to the holdings . . . of this Court's decisions as of the time of the relevant state-court decision.'" (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000))). *McCoy* was decided after Spisak's conviction became final. *Spisak v. Ohio*, 489 U.S. 1071 (1989) (denying direct review on March 6, 1989). What is more, "it is arguable that the '*Mills* rule' did not fully emerge until the Court issued *McCoy v. North Carolina*." *Beard v. Banks*, 542 U.S. 406, 413 n.4 (2004). This observation further supports the Warden's position that the Ohio Supreme Court in 1988 did not unreasonably apply clearly established federal law.

attempting to complete the verdict form as instructed, may well have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at 384.

In sharp contrast to *Mills*, the trial court's instructions in this case gave the jurors a full opportunity to consider and give effect to all of Spisak's mitigating evidence, without requiring unanimous agreement—or any finding at all—as to particular mitigating factors. The trial court explained that the State bore "the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant . . . was found guilty of committing [were] sufficient to outweigh the factors in mitigation." Pet. App. 318a. Then, after listing the possible aggravating and mitigating circumstances, the court reiterated that the question for the jury was "whether, beyond a reasonable doubt, the aggravating circumstances which the defendant . . . ha[d] been found guilty of committing in the separate counts [were] sufficient to outweigh the mitigating factors present in this case." Pet. App. 324a. The trial court instructed that if "all twelve members of the jury [found] by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweigh[ed] the mitigating factors," then the jury was required to "recommend to the Court that a sentence of death be imposed upon the defendant." Pet. App. 324a. If, on the other hand, the jury found "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] ha[d] been found guilty of committing in the

separate counts outweigh[ed] the mitigating factors," then it should impose one of two life sentences. *Id.*

These instructions differed from the *Mills* instructions in at least three critical respects. First, the instructions did not ask the jury to consider seriatim and vote up or down on each individual mitigating factor. Compare Pet. App. 323a-326a with *Mills*, 486 U.S. at 387. In fact, the jury was not told to make a specific *finding* on any of the mitigators; it was simply told to "consider[]" the mitigating factors, Pet. App. 323a, and to balance "the aggravating circumstances which . . . Spisak . . . has been found guilty of committing" against "the mitigating factors present in the case," Pet. App. 324a. Second, the trial court never suggested, either explicitly or implicitly, that the jury could consider only those mitigating factors on which the jurors agreed, unanimously or otherwise. Compare Pet. App. 323a-326a with *Mills*, 486 U.S. at 378-79 & n.12. Third, the instructions made clear that the jury could consider *all* relevant mitigating evidence. Compare Pet. App. 323a with *Mills*, 486 U.S. at 380. It is therefore not reasonably likely that the jurors misunderstood these instructions as requiring unanimity before they could consider a particular mitigating circumstance.

The instructions here were also fully consistent with—and in fact derived from—the Eighth Amendment principles that animated *Mills*. The *Mills* rule followed from the requirement, articulated in *Lockett*, that the sentencer be permitted to consider any relevant mitigating evidence. *Mills*, 486 U.S. at 374-75 (citing *Lockett*). Ohio's capital-sentencing statute had the same

origin. After *Lockett* invalidated Ohio's earlier capital-sentencing statute because it did "not permit the type of individualized consideration of mitigating factors" that the Constitution requires, 438 U.S. at 606, Ohio revised its law to allow the jury to consider all relevant mitigating factors. See *State v. Watson*, 572 N.E.2d 97, 113 (Ohio 1991) (Resnick, J., dissenting) ("[F]ollowing the United States Supreme Court in *Lockett v. Ohio*, the General Assembly amended [Ohio Rev. Code §] 2929.04(B) and added additional mitigating factors." (citation omitted)).

Spisak's mitigation evidence—which consisted of testimony from three experts who agreed that Spisak suffers from mental defects, J.A. 460-624—was relevant under two different prongs of Ohio's revised capital-sentencing law: factor (3), relating to "mental disease or defect," and factor (7), the catch-all category. See Ohio Rev. Code § 2929.04(B)(3), (7) (LexisNexis 1983).[2] The catch-all permitted the jury to consider a wide range of mitigating evidence, including "the defendant's character and record, and the circumstances of the particular offense." *State v. Holloway*, 527 N.E.2d 831, 834 (Ohio 1988) (citing *Lockett*). The jury charge regarding mitigating evidence carefully tracked these statutory provisions, Pet. App. 323a, and therefore satisfied "[t]he requirement of individualized sentencing . . . by allowing the jury to consider all relevant mitigating evidence." *Blystone*, 494 U.S. at 307.

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[2] These provisions remain materially the same today as they were when Spisak was convicted. See Ohio Rev. Code § 2929.04(B)(3), (7) (LexisNexis 2008).

The analysis should stop there. AEDPA permits federal habeas relief only when "the adjudication of the claim" in state court "resulted in a decision that was contrary to, or involved an unreasonable application of," the holdings of this Court. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Because the instructions here complied with *Mills*, it cannot be said that the Ohio Supreme Court, in upholding them under the Eighth Amendment, "arrive[d] at a conclusion opposite to that reached by this Court on a question of law or . . . decide[d the] case differently than this Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413; see also *Musladin*, 549 U.S. at 76. The habeas writ therefore should not have issued on Spisak's *Mills* claim.

2. The Sixth Circuit offered no sound reasons for invalidating the instructions in this case.

Despite the material differences between the instructions here and those in *Mills*, the Sixth Circuit attempted to squeeze this case into the *Mills* box based, it seems, on two theories. First, the court found that the instructions in Spisak's case improperly implied that unanimity as to mitigating factors was required because the trial court never said otherwise, and because the verdict form required twelve signatures. Second, the court held that so-called "acquittal-first" instructions run afoul of the Eighth Amendment. Neither rationale, however, is correct.

a. The instructions here did not imply that unanimity was required as to mitigating factors.

The sentencing instructions in this case required unanimity on one question only: whether the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. According to the Sixth Circuit, however, the instructions unconstitutionally *implied* a unanimity requirement in two different ways: (1) by failing affirmatively to instruct the jury that unanimous agreement was not required as to mitigators, Pet. App. 76a; and (2) by requiring twelve signatures on the verdict form stating that the aggravators outweighed the mitigators, Pet. App. 74a. But neither of these features is a problem under *Mills*.

First, the Sixth Circuit found that "the silence on the lack of unanimity required to find mitigating circumstances . . . would have led a jury to apply an unconstitutional unanimity standard at all stages of the deliberative process." Pet. App. 76a. In this regard, the court followed an earlier Sixth Circuit decision that similarly used *Mills* to invalidate jury instructions because of, among other things, the instructions' "silence . . . on the lack of unanimity required for mitigating circumstances." *Davis v. Mitchell*, 318 F.3d 682, 690 (6th Cir. 2003). In the Sixth Circuit, in other words, penalty-phase instructions must include an express, affirmative statement that unanimity is not required as to mitigating factors.

Two problems inhere in the Sixth Circuit's rule. For one thing, the Sixth Circuit's affirmative-

instruction requirement gives jurors too little credit. The jurors were instructed that they had to be unanimous as to the balancing of aggravators and mitigators, but they were not told the same as to the presence or absence of mitigating factors, on which no specific finding was required. Pet. App. 323a-324a. Reasonable jurors would have understood the difference and acted accordingly. See *Boyde*, 494 U.S. at 381 (explaining that "commonsense understanding of the instructions" is likely to prevail in the jury room). At the very least, given "[t]he rule that juries are presumed to follow their instructions," *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the Sixth Circuit was wrong to presume that the jurors would infer a unanimity requirement where none was instructed.

More to the point, the Sixth Circuit's affirmative-instruction requirement finds no basis in *Mills*, as other circuits have concluded. The Tenth Circuit, for instance, examined a claim nearly identical to Spisak's and held that "[a] trial court need not . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); accord *Duvall v. Reynolds*, 139 F.3d 768, 791-92 (10th Cir. 1998). Other courts have reached the same conclusion as the Tenth Circuit. See *Powell v. Bowersox*, 112 F.3d 966, 971 (8th Cir. 1997) (finding no *Mills* violation where "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist"); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (finding no *Mills* violation where instruction required

unanimous finding on aggravators but no unanimity instruction on mitigators); *Gacy v. Welborn*, 994 F.2d 305, 307-08 (7th Cir. 1993) (same); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3d Cir. 1991) (same). But see *Abu-Jamal v. Horn*, 520 F.3d 272, 303 (3d Cir. 2008) (finding *Mills* error), *cert. petition pending sub nom.*, *Beard v. Abu-Jamal*, No. 08-652. In fact, other Sixth Circuit panels likewise have found no affirmative-instruction requirement. See, e.g., *Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998).

Given that the circuits are divided (in a lopsided way) on this point, one of two things must be true: either (1) the Sixth Circuit is wrong, and *Mills* does not require an affirmative instruction that unanimity is not required as to mitigators, or (2) the affirmative-instruction requirement is not clearly established by *Mills*. In either event, AEDPA does not permit relief. See *Musladin*, 549 U.S. at 76.

The Sixth Circuit cited a second reason for concluding that the instructions here implied a unanimity requirement as to mitigating factors: Both the instructions and "the verdict form . . . reflected a unanimity requirement for a finding that the mitigating factors outweighed the aggravating factors." Pet. App. 74a. But the verdict form in this case did not resemble the problematic verdict form in *Mills*. The jurors in *Mills* were required to render a yes-or-no answer as to each potential mitigating factor, and all twelve jurors were then required to sign the form. *Mills*, 486 U.S. at 378-79. Here, by contrast, the jurors were simply required to indicate by signature whether, in the end, the aggravating

circumstances outweighed any mitigating factors beyond a reasonable doubt. Pet. App. 325a. That is to say, the verdict form merely replicated the unanimity-in-balancing instruction, and *Mills* permits that form of unanimity requirement. See *Arnold*, 113 F.3d at 1363; *Powell*, 112 F.3d at 970-71; *James*, 926 F.2d at 1448-49. States may, after all, impose the death penalty upon "a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant," *Blystone*, 494 U.S. at 305. Habeas relief is therefore not appropriate on this theory. See *Waddington v. Sarausad*, 129 S. Ct. 823, 833 (2009).

b. So-called "acquittal-first" instructions—even if present here—are consistent with the Eighth Amendment.

The Sixth Circuit offered a final rationale for invalidating the instructions in this case: It held that so-called "acquittal-first" sentencing instructions—that is, instructions that suggest that a jury must unanimously acquit the defendant of the death penalty before it may consider a life sentence—violate *Mills v. Maryland*. Pet. App. 74a-76a. But this reasoning attempts to insert a square peg into a round hole, for even assuming the instructions here required an "acquittal first" (and they did not), such an instruction does not run afoul of *Mills*.

The Sixth Circuit's "acquittal-first" reasoning again rested heavily on the court's earlier decision in *Davis v. Mitchell*, 318 F.3d 682. In that case, the Sixth Circuit correctly observed that, under Ohio

law, a deadlocked jury need not reach unanimity on the death penalty, but instead may proceed to return a unanimous noncapital sentence. *Id.* at 689 (citing *State v. Brooks*, 661 N.E.2d 1030 (Ohio 1996)). But the court then stated, without citation, that such a "non-unanimous mechanism" for preventing a death sentence was "constitutionally required." *Davis*, 318 F.3d at 689. The *Davis* court went on to assert, again without citation or explanation, that an "instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." *Id.* The Sixth Circuit panel in this case echoed *Davis*'s unsupported conclusion, stating that Spisak's so-called "acquittal-first" instruction "impermissibly imposed a unanimity requirement on the jury's ability to find mitigating factors in violation of . . . *Mills* and *McKoy*." Pet. App. 4a.

As an initial matter, the Sixth Circuit's conclusion rests on the premise that the instructions here violated Ohio law by requiring an "acquittal first," but that premise contains three flaws. First, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Second, Ohio law neither requires nor permits what the Sixth Circuit calls "acquittal-first" instructions. See Ohio Rev. Code § 2929.03(D)(2); *Brooks*, 661 N.E.2d at 1040 (invalidating an instruction that required the jury "'to determine unanimously that the death penalty is inappropriate before [it could] consider a life sentence'" (quoting instruction)). And third, the instructions in this case were not

"acquittal-first" instructions. In fact, the Ohio Supreme Court has held that instructions virtually identical to those at issue here are consistent with Ohio law. See *State v. Davis*, 666 N.E.2d 1099, 1109-10 (Ohio 1996) (upholding instructions essentially verbatim of those here because, "unlike the instructions given in *Brooks*, the jury was not instructed that it was required to *unanimously* determine that the death penalty was inappropriate before it could consider the life sentence alternatives").

Even assuming, however, that the instructions here did what the Sixth Circuit suggests and were inconsistent with Ohio law, a so-called "acquittal-first" instruction does not fall within the contours of *Mills*. The defect in *Mills* was not that the jurors had to render an up-or-down verdict on death before they could deliberate on alternative life sentences; it was that they essentially had to make unanimous special findings on each mitigating factor before they weighed, in a second stage, the aggravating factors against those mitigating factors that they had found present. *Mills*, 486 U.S. at 379-80. The problem, in other words, was that the weighing process was incomplete, not that it was required in the first place.

The Sixth Circuit's concern appears to be different. The court's rule is that the Constitution requires a "non-unanimous mechanism that will prevent a recommendation of death," *Davis*, 318 F.3d at 689—namely, an instruction that "'clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty.'" Pet. App. 76a (quoting *Davis*, 318

F.3d at 689-90). Put differently, the Sixth Circuit's view seems to be that the Eighth Amendment requires a mechanism by which the jury can bypass a decision on the death penalty and move straight to a verdict on a life sentence. But the Constitution requires no such thing.

This Court has "long been of the view that 'the very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" *Jones v. United States*, 527 U.S. 373, 382 (1999) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). Moreover, "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)). Given these strong governmental interests, this Court has held that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." *Jones*, 527 U.S. at 381; see also *Lyons v. Lee*, 316 F.3d 528, 534 n.8 (4th Cir. 2003) (applying *Jones* to reject a habeas plea based on the absence of a juror-deadlock instruction).

Instead, the Eighth Amendment is satisfied so long as the jury instructions permit an individualized sentencing determination that takes into account all relevant mitigating evidence. See *Blystone*, 494 U.S. at 307. An "acquittal-first" instruction does not restrict "*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision"; it simply structures "*how* [the jury] must consider the mitigating

evidence." *Saffle v. Parks*, 494 U.S. 484, 490 (1990); see also *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998) ("[W]e have never . . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence."). Neither the Eighth Amendment generally nor *Mills* specifically precludes the State from structuring the deliberative process this way.

Even if the Sixth Circuit's "acquittal-first" rule has merit—and the Warden maintains that it does not—Spisak is entitled to habeas relief on that theory only if it was clearly established law at the time the Ohio Supreme Court rejected his Eighth Amendment claim. As shown above, the Sixth Circuit's rule does not follow from *Mills*. It is a creature of the Sixth Circuit's own devise in *Davis*, and one that no other circuit has followed. Indeed, the only federal courts outside the Sixth Circuit to use the phrase "acquittal first" have applied it to guilt-phase instructions that require rejection of a greater offense before consideration of a lesser-included offense. And those courts have found that an acquittal-first guilt-phase instruction is constitutionally permissible, particularly if the defendant does not request a different instruction. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984) (per curiam); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978); *United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978). Thus, the Sixth Circuit's penalty-phase "acquittal-first" rule is not clearly established, and AEDPA bars relief.

B. Trial counsel's closing argument was not constitutionally ineffective under *Strickland*.

Spisak cannot prevail on either prong of the two-step analysis for ineffective-assistance claims under *Strickland v. Washington*, 466 U.S. 668 (1984): The first question is whether "counsel's performance was deficient," and, if so, the second is whether "the deficient performance prejudiced the defense." *Id.* at 687. Because the Ohio Supreme Court rejected Spisak's ineffective-assistance claim on direct review, Spisak must show under AEDPA not "that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance," but rather that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002). The state court's rejection of the claim was reasonable, however, because counsel's penalty-phase summation was neither deficient nor prejudicial.

1. The closing argument was objectively reasonable.

Spisak fails on the first step of the *Strickland* inquiry because his trial counsel's performance did not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To "eliminate the distorting effects of hindsight," the deficiency inquiry affords "a strong presumption" of reasonableness to counsel's decisions, and the conduct at issue is evaluated "from counsel's perspective at the time." *Id.* at 689. In erroneously concluding that trial counsel's performance was deficient, the Sixth Circuit disregarded both the

presumption of reasonableness and the context of the closing argument in this case.

Strickland's presumption of reasonableness is strongest when the claim of ineffective assistance centers on counsel's strategic decisions, such as how to conduct a closing argument. "[C]ounsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (per curiam). "Judicial review of a defense attorney's summation is therefore highly deferential . . . ." *Id.*

In this case, counsel's strategy at the penalty-phase closing argument was shaped by the lengthy guilt-stage proceedings that preceded it. Spisak's guilt of the underlying crimes was not (and could not be) contested. Two of the victims survived, and they identified Spisak as the assailant. Pet. App. 301a-302a. Ballistic tests linked Spisak's guns to the murders. Pet. App. 303a. Spisak also confessed his involvement in the crimes, Pet. App. 364a-370a, even signing a congratulatory note to the investigating detectives on a "White Power" t-shirt, J.A. 221-23. The message said, "For another job well done, good luck, Sieg Heil." J.A. 223. As in *Bell*, "[t]he State had near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings." 535 U.S. at 699.

Faced with this overwhelming evidence of guilt, Spisak's counsel frankly admitted in a sidebar that he was left with a defense of insanity or mental disease. J.A. 140-41. To buttress that defense,

Spisak himself took the stand at trial on his guilt. That testimony proved to be a double-edged sword: It demonstrated that Spisak is mentally disturbed, but it also cast him in an unsympathetic light.

During his days-long testimony, Spisak explained that he had a normal upbringing: He performed well in school, J.A. 9, and his parents properly cared for him, J.A. 252-53. But he also explained that he began studying Hitler and Nazism in junior high school because he "wanted to know the truth," J.A. 40, and that he joined the American Nazi Party in 1970, J.A. 41. He identified Hitler as his spiritual leader, likening the dictator both to this country's founding fathers, J.A. 48, and to Jesus Christ, J.A. 63. He referred to Hitler as God's disciple, J.A. 74, and "the greatest man in the last two thousand years of man's history," J.A. 63.

Spisak then indicted the Jewish people as "the one world leaders," J.A. 48, who were programming "the masses" through the news media, J.A. 51, and "brainwashing the youth" on university campuses, J.A. 121. He claimed that the Jewish people—specifically Jewish psychiatrists—were "trying to encourage the youth in homosexuality." J.A. 203. Spisak also "decide[d] to take up arms against" African Americans because they were "breeding at a rate that will soon make the white people extinct." J.A. 52-53. He wanted to kill "as many as [he] could get before [he] got caught, one thousand, a million, the more the better." J.A. 68. Spisak viewed himself as a soldier: "I am fighting against the forces of darkness which are represented by Satan and his children, the Jews and Satan creation which is the dark races." J.A. 144. He therefore sought to "inflict

the maximum amount of damage and casualties on the enemies." J.A. 147.

Spisak explained that the shooting spree and murders followed from his belief system. He sought to "create terror [at Cleveland State University] and make the conditions such that they could no longer insure the safety of the students and they would have to close the university down." J.A. 122. He admitted that he shot Reverend Horace Rickerson in a campus bathroom, J.A. 88-89, saying that he "felt like [he] might have accomplished something meaningful, something good," by shooting a black man, J.A. 97-98. He also expressed pride in his method of execution, saying it was "pretty nice," "pretty slick." J.A. 323. After that murder, Spisak said, "I realized that I had picked up a cross, that I would have to go all the way with it to the bitter end," J.A. 92, to "give my life for the survival of my people and my race," J.A. 93. Spisak offered a similar explanation for his shooting of John Hardaway. He followed Hardaway, also a black man, into a transit station one evening to seek "blood atonement." J.A. 112. After "inflict[ing] casualty on the enemy," J.A. 118, Spisak celebrated with "a pizza and a couple of Cokes," J.A. 120.

Spisak openly admitted to murdering Brian Warford—a young black man who had fallen asleep in a bus stop near campus. J.A. 166-71. Spisak told the jury that "it's always best to attack at the point of least resistance or at the point where you can catch the enemy unaware." J.A. 169. Emphasizing Warford's youth, he further explained that "[i]t's best to get them when they're young." J.A. 169-70. The "set-up" to Warford's murder, according to Spisak,

"was so perfect" that it must have involved "help from God." J.A. 172. Finally, Spisak reported that he targeted Timothy Sheehan in a campus restroom because he "thought this man was a Jewish professor." J.A. 192. He "[a]imed right between [Sheehan's] eyes and shot him" multiple times. J.A. 194.

During this presentation, Spisak was remorseless. He stated that he "felt bad" only when he learned that Sheehan was not Jewish. J.A. 196. Spisak also expressed pride in his willingness to testify: "We need somebody to get up here and take the stand and give a reasonable logical concise explanation for those things which must be done." J.A. 125; see also J.A. 361-62 (same). Finally, Spisak left no ambiguity as to his intentions if he were ever released: "I would go out and continue the war I started. . . . I would continue to inflict the maximum amount of damage on the enemies as I am able to do." J.A. 416.

Other cues during the trial reinforced the depravity of Spisak's beliefs. Before trial, Spisak grew a moustache and shaved it to resemble Hitler's. See J.A. 289, 391, 437. And on cross examination, after the prosecutor read into evidence a violent letter from Spisak that was laced with racist epithets, see, e.g., J.A. 372-74, Spisak declared "Heil Hitler" and performed the corresponding salute. J.A. 374.

Spisak's testimony presented trial counsel with a formidable task at the penalty phase. Counsel had to focus his mitigation efforts on the one theory that still had currency—that Spisak's mental illness entitled him to leniency. Counsel introduced

that theme during his penalty-phase opening argument: "Our contention is, has been and will continue to be, that Frank Spisak is sick, very sick. We think that we will be able to show you that." J.A. 455. Then, as the Sixth Circuit recognized, counsel presented "extensive evidence of [Spisak's] severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation." Pet. App. 69a. Counsel called three experts in mitigation to testify as to Spisak's mental disease. This evidence was relevant to two statutory mitigating factors under Ohio law. Ohio Rev. Code § 2929.04(B)(3), (7).

Counsel returned to the mental-illness theme in his closing argument. See Pet. App. 339a-344a; 353a-354a. He argued that "humane people . . . are proud to be different" in their belief that offenders are less culpable if they lack "the mental ability to commit the sin." Pet. App. 340a. In that vein, he submitted that Spisak, while "not insane enough to be criminally insane," is "sick and demented so that the ability to intend is substantially reduced." Pet. App. 341a. Counsel identified with the jurors as "kind of a layman," just "a lawyer from Buckeye Road," and said that it "didn't take" an expert to tell him that "we have got just a guy that's just crazier than hell." Pet. App. 347a-348a. He ended by again appealing to the jurors' oath and to their nature as "humane people." Pet. App. 358a.

In concluding that trial counsel's performance was deficient, the Sixth Circuit identified four specific shortcomings. All of the factors to which the court pointed, however, are reasonable when viewed from counsel's perspective at the time. First, the

Sixth Circuit cited counsel's "extremely graphic and overly descriptive recounting" of Spisak's crimes. Pet. App. 64a (citing Pet. App. 334a-336a). As described above, the gruesome details of the murders were not contested at trial, nor could they be, given that Spisak proudly admitted to them. These damaging facts were already before the jury, and the prosecutor undoubtedly would highlight them in his closing argument (and did, see J.A. 632-35). Given that reality, Spisak "cannot overcome the presumption that his counsel's decision to concede the aggravator's existence was 'sound trial strategy.'" *Palmer v. Clarke*, 408 F.3d 423, 444 (8th Cir. 2005) (citation omitted); accord *Hooker v. Mullin*, 293 F.3d 1232, 1246-47 (10th Cir. 2002). Counsel might reasonably have calculated that it was better to draw the sting out of the prosecution's argument and gain credibility with the jury by conceding the weaknesses of his own case. Such a trial tactic is not only common, but advisable. See Roger Haydock & John Sonsteng, *Advocacy: Opening and Closing: How to Present a Case* § 3.51, at 106 (1994) ("If the advocate cannot think of any mitigating explanation, then the weakness should be conceded in a candid and forthright manner."); Thomas A. Mauet, *Trial Techniques* 413 (5th ed. 1999) ("[T]he jury will respect your honesty and candor when openly and candidly discussing [your] weaknesses."). By comparison, "[h]ad counsel attempted to pass the crimes off as anything other than the atrocities that they were, his credibility with the jury would most certainly [have] become suspect." *Clozza v. Murray*, 913 F.2d 1092, 1099 (4th Cir. 1990).

Second, the Sixth Circuit condemned counsel for highlighting Spisak's "association with the Third

Reich and the Nazis." Pet. App. 64a. But a closing argument, like any effort at persuasion, "should indicate to the audience that the speaker shares the attitudes of the listener." Peter C. Lagarias, *Effective Closing Argument* § 2.06, at 100-01 (1989). Any reasonable observer of the trial would have recalled Spisak's vivid proclamations of support for Hitler and viewed those declarations as "sick," "twisted," and "distorted." Pet. App. 337a. Such characterizations were all the more likely in this case because several members of the jury—four African Americans, a Jewish person, and two World War II veterans, see Trial Tr. at 145 (June 20, 1983)—might have taken particular offense to Spisak's testimony. Under these circumstances, counsel's decision to bolster his own sincerity by criticizing his client's indefensible views was reasonable. See *Yarborough*, 540 U.S. at 9 ("By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case."); Jacob A. Stein, *Closing Argument: The Art and the Law* § 204, at 10 (1990) ("The effect of sincerity is heightened if it appears that your code of morality and judgment of what is right and wrong coincide with the code of morality of the jury.").

Third, the Sixth Circuit criticized counsel's decision to discount particular mitigation leads by saying, "don't look to him for sympathy, because he demands none"; "don't look for good deeds, because he has done none"; and "[d]on't look to him for good thoughts, because he has none." Pet. App. 65a (quoting Pet. App. 338a). But the jurors had already heard Spisak's testimony, seen his Hitler moustache, and watched him perform a Nazi salute. There was

no chance that they harbored any sympathy for Spisak, and no reason for counsel to spend "time in trying to paint a weed as a lily." Frank M. Coffin, *A Lexicon of Oral Advocacy* 29 (1984). Instead, counsel pivoted from Spisak's depravity to the humanity within the jurors, appealing to their better nature not to sentence to death a "sick and demented" person. Pet. App. 339a-341a.

Fourth, the Sixth Circuit called "[m]ost shocking of all" trial counsel's "suggest[ion] to the jury that either outcome, death or life, would be a valid conclusion." Pet. App. 65a. But counsel's point in this passage was not, as the Sixth Circuit suggested, to say that a death sentence would be a desirable outcome. Rather, counsel's object was to appeal to the jurors' sense of duty: "We can be proud because we are a humane people. . . . [W]hatever you do, we can be proud because we lived up to the oath that we took." Pet. App. 359a-360a. That appeal echoed counsel's main theme: that humane people do not execute the mentally disturbed. Pet. App. 339a-342a. Counsel's approach also stressed the jury's autonomy—a "low-key strategy that . . . is not unreasonable." *Yarborough*, 540 U.S. at 10; accord *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) ("[C]ounsel may make strategic decisions to . . . concede that the jury would be justified in imposing the death penalty, in order to establish credibility with the jury."). In fact, several treatises commend that approach. See Stein, *Closing Argument*, § 206, at 15 ("Avoid challenging the jury to find for your client, or phrasing your argument in terms suggesting what their finding must be. . . . The better policy is to indicate by voice, manner, and words that you know the jury will do its duty under

the law and under the evidence in the case."); Fred Lane, *Goldstein Trial Technique* § 23:102 (3d ed. 2000) (same).

Simply put, Spisak's counsel was in a difficult bind. The jurors could not forget or ignore Spisak's proud declarations of guilt, idolization of Hitler, and promise to "continue the war." Counsel accordingly told the one story left open to him—mental illness. See Pet. App. 339a-344a; 353a-354a. He reasonably made that story the "unifying theme" and "centerpiece of his case." *Yarborough*, 540 U.S. at 6, 9.

For Spisak to receive federal habeas relief on the basis of that summation, he must show not just that his counsel's performance was deficient, but that the state courts were "objectively unreasonable" in finding the opposite. *Id.* at 5; see 28 U.S.C. § 2254(d)(1). "Judicial review of a defense attorney's summation is . . . doubly deferential when it is conducted through the lens of federal habeas." *Yarborough*, 540 U.S. at 6. The Ohio courts were not objectively unreasonable in finding that counsel's performance was adequate, particularly when the performance is judged—as it must be under *Strickland*—"from counsel's perspective at the time." 466 U.S. at 689. Given trial counsel's difficult position, his closing was not deficient. Under AEDPA's deferential standard of review, Spisak is not entitled to habeas relief.

2. The closing argument did not affect the outcome.

Even assuming Spisak can show that counsel's summation was professionally unreasonable, he

cannot demonstrate that those shortcomings affected the outcome. That is to say, he cannot establish, based on "the totality of the evidence," that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

Although Spisak accepts *Strickland* as "the proper legal standard" for assessing prejudice in this case, Opp. to Cert. at 16, the Sixth Circuit did not. The court's entire prejudice analysis was confined to one conclusory sentence: "Absent trial counsel's behavior during the closing argument of the mitigating phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ." Pet. App. 67a. The court did not articulate why a reasonable probability existed that, but for counsel's closing argument, the jury would have elected a life sentence. Instead, the Sixth Circuit relied on an earlier decision, *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), in which the court afforded a presumption of prejudice to a habeas petitioner claiming ineffective assistance of counsel. *Id.* at 1156-60 (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

The Sixth Circuit was wrong to apply the *Cronic* presumption instead of the standard *Strickland* prejudice analysis. Prejudice is presumed only when "'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" *Bell v. Cone*, 535 U.S. 685, 696 (2002) (quoting *Cronic*, 466 U.S. at 659) (emphasis added).

The courts of appeals agree that *Cronic* applies only to extreme cases of non-representation, not to poor representation or discrete acts of ineffectiveness. See, e.g., *Miller v. Martin*, 481 F.3d 468, 473-74 (7th Cir. 2007); *Benge v. Johnson*, 474 F.3d 236, 247 (6th Cir. 2007); *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006); *Freeman v. Graves*, 317 F.3d 898, 900-01 (8th Cir. 2003); *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002). Spisak now argues only that his counsel's performance fell short at a specific point of the trial, not that counsel was ineffective throughout the course of the proceedings. In fact, the Sixth Circuit rejected Spisak's argument that counsel performed an inadequate mitigation investigation, finding that counsel had collected "an extensive social history." Pet. App. 68a. Given the narrow scope of Spisak's ineffectiveness claim, *Strickland* supplies the proper inquiry, and Spisak must demonstrate actual prejudice to prevail. See *Strickland*, 466 U.S. at 687.

Spisak cannot show prejudice for three reasons. First, nothing that counsel said during closing argument undermined Spisak's case for mitigation. As the Sixth Circuit itself recognized, "[t]he best chance of mitigation available was in fact the evidence that [Spisak] was, to some degree, mentally ill." Pet. App. 69a. Counsel pressed the mental-illness theme in his closing. See Pet. App. 339a-344a; 353a-354a. His disputed comments about the depravity of the murders, Spisak's "misguided philosophy," Pet. App. 336a, and Spisak's "sick twisted mind," Pet. App. 337a, were consistent with, and arguably even advanced, that theme. At the very least, the comments did not undercut counsel's principal theme of mental illness. The jurors

therefore had in mind Spisak's mitigation case and considered evidence supporting that argument.

Second, the closing argument was only a minor piece of the lengthy trial proceedings in this case, and its effect on the jury's sentencing verdict should not be overstated. By the time Spisak's counsel rose for his penalty-phase summation, the jurors had lived with the case for a month. They visited the crime scene, heard dozens of witnesses, and examined all the physical evidence. They also deliberated together over Spisak's guilt. It is unrealistic to suppose that that the penalty-phase closing argument, which lasted several minutes, overshadowed what the jurors heard and saw during the guilt- and penalty-phase proceedings, which together lasted several weeks. On the contrary, "empirical evidence [suggests] that jurors do not change their tentative verdict preferences at the close of the evidence as a result of closing arguments." Albert J. Moore, et al., *Trial Advocacy: Inferences, Arguments and Techniques* 214 (1996); accord Herbert J. Stern, *Trying Cases to Win: Summation* 27 (1995) ("After many days or weeks of trial, the jurors are not sitting in their box in open-minded expectation, waiting to hear our summations before making up their minds."). In any event, before the jurors deliberated on Spisak's sentence, the trial court instructed them that counsel's arguments "are not evidence," Pet App. 316a, and the jury is presumed to have followed that directive, see *Richardson*, 481 U.S. at 211.

Third, well before counsel stood to close, the damage to Spisak's mitigation case had already been done—by Spisak himself. The disputed subjects to

which counsel referred in summation were all placed in evidence during Spisak's trial testimony. Spisak had expressed pride about the shootings, stated his desire to emulate Hitler, and insisted that he would "continue the war." J.A. 416. The wisdom of counsel's decision to refer back to that evidence might be debatable, but the jury's sentencing verdict would not "reasonably likely have been different" absent counsel's closing argument. *Strickland*, 466 U.S. at 696.

What is more, the Sixth Circuit did not cite, nor has Spisak ever offered, an example of a successful ineffective assistance claim based solely on a penalty-phase closing argument. A survey of the lower federal courts shows that habeas petitioners succeed in establishing *Strickland* prejudice when they can demonstrate *other* errors by counsel—an unreasonable mitigation investigation or an inadequate penalty-phase presentation—alongside a lackluster closing argument. See, e.g., *Belmontes v. Ayers*, 529 F.3d 834, 864-68 (9th Cir. 2008); *Coleman v. Mitchell*, 268 F.3d 417, 452-53 (6th Cir. 2001); *Hall v. Washington*, 106 F.3d 742, 749, 752 (7th Cir. 1997); *Horton v. Zant*, 941 F.2d 1449, 1463 (11th Cir. 1991). In sharp contrast to those cases, trial counsel here adequately investigated and presented Spisak's "best chance of mitigation" to the jury—the "extensive evidence" of his "severe personality disorder, flirtation with . . . a sex change, sexual confusion, and social isolation." Pet. App. 69a.

On federal habeas review, the question is not whether counsel's allegedly deficient closing remarks affected the outcome, but rather whether the Ohio

Supreme Court's determination to the contrary was "unreasonable." *Landrigan*, 550 U.S. at 473. Given the uncontested nature and heinousness of the murders, the length of the trial, and Spisak's own performance on the witness stand, it is unlikely, to say the least, that trial counsel's remarks affected the jury's final verdict. At minimum, this record shows that the Ohio Supreme Court acted reasonably when it rejected the claim.

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

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In The Supreme Court of the United States

KEVIN SMITH, Warden,

Petitioner,

vs.

FRANK J. SPISAK, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

I. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

II. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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STATEMENT OF THE CASE

A. Pre-trial Court Clinic assessments of Spisak's mental health indicated Spisak was mentally ill.

On 3-29-83, the Cuyahoga County Grand Jury indicted Spisak on four counts of aggravated murder with capital specifications in violation of Ohio Rev. Code § 2903.01, 2929.04(A); three counts of aggravated robbery in violation of Ohio Rev. Code § 2911.01; one count of attempted murder in violation of Ohio Rev. Code § 2903.02, and one count of receiving stolen property in violation of Ohio Rev. Code § 2913.51.

Spisak entered a plea of not guilty by reason of insanity. Prior to trial, the court ordered Spisak evaluated for competency and sanity by Court Clinic psychiatrist, Dr. Phillip Resnick.

1. The social history.

The social history generated by the Court Psychiatric Clinic revealed that Spisak had childhood fantasies of being a woman. JA 657-658. As a child Spisak experienced repeated nightmares, reported he saw rooms change shape and heard people laughing at him. JA 653-654. At fourteen, Spisak became interested in Hitler, indicating "the literature he read made him feel superior." JA 658.

Because his parents would not give him money for college he worked two jobs and was admitted in

fall, 1969, to Cleveland State University. JA 658. When, after one year, Spisak's mother decided he could no longer live at home, Spisak was unable to attend school and took on more permanent jobs to be able to afford an apartment. JA 658.

In 1973, Spisak married Laverne, the first woman with whom he had sexual relations. They had a child the following year. In 1977, Spisak began to wear women's clothing and received estrogen treatment from the Gender Dysphoria clinic at Cleveland Metropolitan Hospital. JA 658-659. Spisak and Laverne divorced in 1978, when Spisak began dressing like a woman. JA 660. The same year Spisak also lost his manufacturing job of five years when he began to go to work dressed as a woman. Spisak subsequently, dressed as a woman, found new employment with a maker of eyeglasses. He was fired when the company discovered Spisak was not a female. JA 658.

After being fired, Spisak, dressed as a woman, began to prostitute himself on the Cleveland streets until he was arrested and charged with soliciting. Spisak found brief employment at Kelly Girls, a temporary job agency, until Spisak, looking "more like a man," was again fired. JA 659.

Spisak returned again to dressing like a man and found another machinist job. JA 659. He tried to be "overly macho" in his dress, wearing boots and chains. JA 659.

In early 1979, "shortly after he began to dress like a man," Spisak became involved with the National Socialist Party of America. JA 659. Spisak remarried Laverne in 1980, but the re-marriage lasted only four months. In part, Laverne became "repulsed" by all the Nazi memorabilia that Spisak "would not sell because he considered it to be a symbol of virility and manhood." JA 661.

2. The psychological testing by Court Clinic psychologist Dr. Althof.

Dr. Althof, a psychologist employed by the Cuyahoga County Court Clinic, administered a full battery of testing to Spisak for the purposes of pre-trial competency and sanity assessments. JA 677.

Dr. Althof's Psychological Evaluation indicated that test results "revealed multiple ego impairments" and assessed that, "[g]iven his poor judgment, thought disorders, tenuous reality testing and impaired affective regulation, Mr. Spisak seems prone to impulsive psychotic rages." JA 681-682. Dr. Althof's evaluation addressed a relationship between Spisak's mental illness, his sexual identity confusion, and his professed Naziism and racial issues.

> Paranoid obsessions were noted, focusing on hatred of Blacks, sadistic morbid fantasies of dead babies and identifications with powerful Nazi figures. Emotionally ladden [sic] stimuli resulted in the disruption of logical thinking and the intrusion of fused primitive

> highly charged sexual and aggressive impulses.
>
> * * *
>
> Mr. Spisak projects his unacceptable sexual and aggressive impulses onto Blacks. . . . His quasi political identifications serve as an obsessive-paranoid defense mechanism, whereby he wards off, albeit unsuccessfully, his projected aggression, inadequacy and sexual confusion.

JA 681-682. Dr. Althof noted that Spisak's personality disorder diagnosis "does not do justice to the severity of the patient's psychological condition." JA 682.

3. Dr. Resnick's competency assessment.

In finding Spisak competent to stand trial, Dr. Resnick's report noted how Spisak became "obsessed" both with Nazi ideology and "with the idea of becoming a woman." It reported how Spisak received estrogen treatment from the Gender Dysphoria clinic at Cleveland Metropolitan Hospital so he could develop breasts and presented himself as a candidate for surgical transition to being a woman. Spisak dropped out of the program but continued to dress as a woman. JA 671. Resnick's diagnosis of schizotypal personality was "manifested in Mr. Spisak by evidence of bizarre fantasies and preoccupations, ideas of reference, social isolation, recurrent illusions, vague metaphorical speech, suspiciousness and paranoid ideas, and hypersensitivity to criticism." JA

675. Resnick's psychological testing demonstrated a disturbance in Spisak's thinking process, but not classical signs for schizophrenia. JA 676.

Resnick indicated Spisak's demonstration of disturbed thinking and psychiatric symptoms "ha[d] improved substantially since he has been incarcerated." The Competency Report concluded that Spisak's current thought processes and "mild paranoid thinking" did not render him incompetent to stand trial. JA 676.

4. Dr. Resnick's sanity assessment.

In assessing Spisak's sanity, Dr. Resnick did not find Spisak to suffer from a mental disease or defect because Spisak's schizotypal personality disorder "is not considered a psychosis and does not cause him to be out of touch with reality." JA 694. Dr. Resnick detailed Spisak's own extensive admissions concerning the offenses and concluded that even if mentally ill, no mental diseases interfered with his appreciation of the wrongfulness of his acts or his ability to refrain. JA 695-698.

B. The trial court denied presentation of an insanity defense because defense experts recognized Spisak as seriously mentally ill but no one expert found Spisak legally insane.

Upon Spisak's request, the court ordered evaluations by Dr. Oscar Markey, Dr. Sandra

McPherson, Dr. Kurt Bertschinger, and Drs. S.M. Samy and Koerner.

1. Dr. Markey testified during a *voir dire* examination that Spisak had a mental disease or defect, that Spisak was unable to control his actions during the homicides, and that Spisak did not know right from wrong.

The Sixth Circuit noted that Dr. Markey acknowledged that Spisak suffered from an atypical schizophrenia and a schizotypal personality disorder. Pet. App. 38a. Markey explained that Spisak's underlying psychotic potential was not in a full blown psychotic state at that moment. Pet. App. 38a; JA 738.

Markey's report stated Spisak was unable to control his impulses to assault even though he was aware that killing was "socially wrong." JA 738. Markey noted that "[t]hese impulses had been chronically present for years, at least from the onset of puberty." JA 738. Markey also told the judge that from our society's way of thinking Spisak did not know the difference between right and wrong. Pet. App. 38a. The trial court permitted Markey to testify at trial. Pet. App. 40a-41a.

2. Dr. Markey's testimony was subsequently stricken at trial.

As the Sixth Circuit noted, Markey testified that Spisak's schizotypal personality disorder was subject

to the possibility of a breakdown which would equate with mental illness. Pet. App. 41a. Markey repeatedly referenced that "potential" for a breakdown but conceded that at trial Spisak did not "have an active mental disease." Pet. App. 41a.

Markey's written report reflected schizotypal delusions indicating that Spisak believed that Hitler was alive and could be elected president and that there are "evil forces which he designates "the System" that are presently evidenced in the Soviet threat and resemble what happened in the beginnings of Christianity and Christ's death and resurrection." JA 735.

The Circuit detailed how on cross-examination the prosecutor undermined Markey's testimony relating to the elements of an insanity defense. Pet. App. 42a. The prosecutor moved to strike Markey's testimony in its entirety as not relevant to the insanity defense. The trial court agreed and struck the testimony.

3. The trial court excluded all other experts from testifying at the culpability phase of trial. Their reports detailing Spisak's mental illness were proffered by defense counsel.

Defense counsel's requests to permit the testimony of other medical experts was summarily denied. The prosecutor argued that none of Spisak's other experts' reports concluded that Spisak was

legally insane. Without *voir dire*, the trial court excluded those experts from testifying during the culpability phase of trial. The partial dissent in the Sixth Circuit's opinion argued that Spisak had a right to present his sanity defense cumulatively, given that there were favorable portions from these psychiatric experts' reports that cumulatively supported a sanity defense. The Circuit majority rejected this approach. Pet. App. 49a.

The defense proffered the following experts' reports.

a. Dr. Bertschinger:

Dr. Bertschinger's proffered report concluded that Spisak's "personality deficits are of such severity that he can be considered to have a mental illness or disease." JA 719. During his mitigation phase testimony, he testified to this effect. JA 521, 532, 544. Bertschinger concluded that, in his opinion, Spisak was mentally ill, and "that mental illness does impair his reason to the extent that he has substantial inability to know wrongfulness, or substantial inability to refrain." JA 524.

Bertschinger's report noted the relationship between Spisak's mental health, his sexual identity, and his idolization of Hitler. Noting that Spisak demonstrated "severe defects in his personality structure," and that Spisak "has always felt abused and hated by people," "as a consequence [he] has identified with powerful figures, such as Hitler, in an

attempt to increase his self worth." JA 719. He also observed that Spisak suffered "severe conflicts regarding his sexual identity and his sexual impulses are fused and intermingled with aggressive impulses." JA 719.

b. Dr. McPherson:

During her mitigation phase trial testimony Dr. McPherson also indicated that Spisak had a mental defect which substantially impaired his ability to conform his conduct to the law. JA 462-463. She diagnosed Spisak with both Schizotypal and Borderline Personality Disorders. JA 463. McPherson wrote in her proffered report tnat "Mr. Spisak acknowledges the presence of delusions, hallucinations, depression and agitation in an extreme degree." JA 702.

Psychological testing indicated Spisak's "potential for decompensation into loss of control is high" and "the deviations of his thinking and functioning are more the product of longstanding defect of his mental condition rather than being reactive to stress." Dr. McPherson further indicated that Spisak "lacks any clear sense of himself and lacks internal control systems," and that Spisak "is a significantly disturbed individual whose defect of mental state is pervasive, and was the general cause of his acts." JA 704.

Dr. McPherson also detailed Spisak's sexual confusion and identity, JA 702, and assessed that the

lack of personality integration, "is in many ways no different than his attempt to find himself in the Nazi movement. . . . He seeks definition and structure from the outside." JA 704.

Dr. McPherson testified in mitigation that Spisak's talk about being identified with Naziism and his talks about a war against Blacks or Jews were "very paranoid ideations" involving "forces [that] are going to overwhelm him." JA 468. Naziism was used like a prop in his distorted reality. JA 480. Dr. McPherson indicated Spisak was a "social isolate," and "was never really a member of the [Nazi] group. In fact, he was early drawn into the Naziism and so forth, because he really didn't fit with other systems of identification." JA 469.

c. Drs. Samy and Koerner:

The psychological report of Drs. Koerner and Samy linked Spisak's emotional and psychological shortcomings and his identity disorders to delusional fantasies and violence. The report diagnosed an Axis I Identity Disorder and Gender Identity Disorder, as well as an Axis II, Atypical Personality Disorder with grandiose and aggressive features. JA 729.

The report placed in context Spisak's outward displays of his Nazi "beliefs" that dominated his trial.

> . . . Mr. Spisak appears to be an emotionally stunted individual with a high need to feel in control and [sic] fear of inadequacy and vulnerability. He tends to view the world in

> an over simplistic manner and he aligns himself with ideologies that legitimize his feelings of alienation and fear. He vacillates between identifying with groups that espouse these socially deviant beliefs and with being a loner. He has a very poorly formed concept of his identity as an adult.

JA 725.

Similarly, the Report concluded that

> Mr. Spisak developed Identity Disorders which affected his way of life and resulted in the development of social, occupational and marital problems. He was aware of that and he stopped wearing female clothing to get his wife back. He was also affected by his mother's strong personality and wanted to be like her, but was unable to achieve a "boss" position as she did. He tried to gain some strength by joining the Nazi Party, but this did not help him in his attempt. This failure aggravated him and he blamed others for his problems . . .

JA 732.

4. Spisak's trial testimony demonstrated these irrational beliefs and sexual identity concerns.

In his trial testimony Spisak consistently demonstrated his irrational thinking consistent with the proffered psychological and psychiatric reports. Spisak testified that he was an agent of God, and that

God had given him the force or power to kill. JA 64; 95. Spisak was able to shoot a gun straight because he had the force of God guiding his hand. JA 62. As an agent of God, Spisak had to bear the cross placed upon him by God. JA 93. Spisak believed that "my immediate superior is God." JA 146.

In Spisak's rambling testimony he stated he was now "a prisoner of war . . . that is being fought between the forces of light and the forces of darkness, which I am temporarily a triumph over my material body." JA 143. Spisak stated that he was fighting the forces of darkness "which are represented by Satan and his children." JA 144. Spisak indicated that in killing he was helped by God because the set up was so perfect. JA 172. Finally, Spisak believed "It's the Holy Spirit in me talking . . . And the Holy Spirit is giving me the words to answer your questions." JA 248-249.

Spisak admitted that prior to his Nazi involvement, in 1978, he dressed as a woman, wore eyeliner and frizzed his hair, spoke to a psychiatrist about seeking a sex change operation, changed his name to the woman's name, Frankie Ann Spisak, and secured a driver's license in that name. JA 202-205.

5. The trial court denied a sanity instruction.

The trial court refused to give a requested insanity instruction. Spisak was found guilty on all counts and capital specifications.

C. In counsel's mitigation phase closing argument he erroneously told the jury that the aggravated circumstances to be weighed included the nature and circumstances of all the killings, indicated Spisak was not worthy of mitigation, and failed to address the link between Spisak's gender identity issues, his mental illness and his involvement with Naziism.

As the mitigation phase commenced, trial counsel began by telling the jury the issue at mitigation was limited to a "very, very narrow question . . . [that] is how sick, if he is sick, and the mental illness, the mental defect, if any, that Frank Spisak may have." JA 455. Counsel concluded his opening argument by abandoning any advocacy with the comment, "If you agree with us, fine. If you don't agree with us, you are the jurors." JA 455.

Counsel called Drs. Bertschinger, McPherson and Markey to the stand to reiterate their trial phase testimony. These witnesses testified to Spisak's mental illnesses, his horrible childhood marked by social isolation, and his gender identity issues. No other witnesses were called on behalf of Spisak at mitigation.

D. Spisak was sentenced to death.

The jury returned a verdict of death which was accepted by the trial court.

E. Direct Appeal and the Ohio Supreme Court's summary rulings.

On direct review, following the vacation of one of the aggravated murder convictions that duplicated a death sentence for one of the victims, Pet. App. 97a, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four propositions of law. The Ohio Supreme Court affirmed Spisak's conviction and death sentence in a four page opinion. Pet. App. 301a-311a.

1. The summary merit review of the *Mills* Claim.

Spisak raised his jury instruction claim as his 54th Proposition of Law. The Ohio Supreme Court summarily denied this claim together with six other separate claims, string-citing five state cases as authority. Pet. App. 306a.

2. The summary merits review of the Ineffective Assistance of Counsel Claim.

Spisak raised his ineffective assistance of counsel claim as his 57th Proposition of Law. The Ohio Supreme Court summarily denied this claim together with 48 other separate claims, string-citing 38 federal and state cases as authority. Pet. App. 307-308a.

3. Denial of certiorari.

Spisak petitioned the United States Supreme Court for a writ of certiorari, which was denied. *Spisak v. Ohio*, 489 U.S. 1071 (1989).

F. State post-conviction.

Not germane to this litigation, Spisak completed a full round of state post-conviction litigation. Pet. App. 116a, 130a.

G. Federal habeas litigation.

The federal district court denied Spisak's habeas petition. Pet App. 299a.

The Sixth Circuit reversed the district court, upheld his aggravated murder convictions, but vacated Spisak's death sentence on two grounds, both of which are the subject of this litigation. The court concluded that the jury's sentencing instructions were improper under *Mills v. Maryland,* Pet. App. 71a-76a, and that trial counsel had rendered ineffective assistance pursuant to *Strickland v. Washington*, during the mitigation phase closing argument. Pet. App. 67a.

Upon the Warden's filing a petition for certiorari, this Court granted the petition, vacated the Sixth Circuit's judgment, and remanded the case for further consideration in light of *Carey v. Musladin*, 549 U.S. 70 (2006), and *Schriro v. Landrigan*, 550 U.S. 465 (2007). Pet. App. 21a.

The Sixth Circuit reinstated its decision. Pet. App. 12a, and then filed an amended order and opinion. Pet. App. 2a. *En banc* review was declined. Pet. App. 1a.

SUMMARY OF ARGUMENT

The Sixth Circuit properly reviewed the merits and the underlying state court decision in determining that Spisak was entitled to *habeas* relief on two independent grounds. The Circuit specifically identified that the two claims were subject to the AEDPA standard of review in 28 U.S.C. § 2254(d)(1) and that the summary state court decision denying Spisak's claims *en masse* were contrary to or an unreasonable application of this Court's clearly established federal law.

The Circuit determined that Ohio's mitigation phase jury instructions violated this Court's directives in *Mills v. Maryland*, 486 U.S. 367 (1988). The Circuit reviewed the totality of the instructions and verdict forms: including the instruction that the jury had to unanimously vote against the death sentence before any consideration could be given to a life sentence; the repeated admonitions that all decisions had to be unanimous; and the absence of any instruction that a finding of a mitigating circumstance did not have to be unanimous, and concluded that under the circumstances, there was a reasonable probability that a juror would have been

foreclosed from considering and giving effect to the mitigation evidence presented. The court concluded that it was possible and reasonable that one juror voting for a death sentence would prevent the remaining eleven jurors from voting for a life sentence because only after unanimously rejecting death could the jury consider life. Permitting one juror to force a death sentence on the remaining jurors is the essence of a *Mills* error.

The Circuit also determined that Spisak's trial counsel was constitutionally ineffective in the closing argument he delivered in the mitigation phase of the case. In reviewing this claim the Circuit repeatedly and expressly applied the test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). At no point did the Circuit cite to or rely on the presumption of prejudice standard announced in *United States v. Cronic*, 466 U.S. 648 (1984). The Court stated that it grounded its decision in *Strickland*. A court is presumed to apply the law it asserts is being applied. There is no evidence that the Circuit applied *Cronic* rather than *Strickland*.

The Circuit determined that counsel's improper emphasis of non-statutory aggravating circumstances, his overt attacks on Spisak, his incoherent ramblings on the justice system, his failure to argue the mitigating factors present in the case, added up to telling the jurors that, contrary to the evidence no mitigating factors existed contrary to the evidence, or even failing to ask the jury to return a life sentence was deficient. The Circuit concluded that counsel's

closing argument reads like a prosecutor's closing argument and that had the same argument been made by the prosecutor, relief would be warranted because of prosecutorial misconduct. Counsel utterly failed to advocate for Spisak and went so far as to tell the jurors they could be proud if they sentenced Spisak to death.

Given the wealth of mental health and other evidence available and present in the case, the Circuit determined that there was a reasonable probability that one juror would have been persuaded to return a life sentence had counsel competently presented a closing argument. There was significant evidence that not only explained the crimes but also Spisak's affiliation with Nazis, his gender confusion, and the positive adaptability to prison in ways that juries regularly rely on to return life sentences. The Circuit specifically found that counsel was not deficient in developing and presenting a case for life. It was counsel's inexplicable closing argument, filled with contempt and hate for Spisak, that destroyed the mitigation presentation and insured that the jury would return a death verdict.

Therefore, the Court should affirm the Circuit's granting of the Writ.

ARGUMENT

I. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

The constitutional question is "whether a reasonable jury would have interpreted the instructions in a way that is constitutionally impermissible." *Mills v. Maryland*, 486 U.S. 367, 375-376 (1988). "The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom [v. Montana]*, 442 U.S. [510], at 516-517 [1979] (state court 'is not the final authority on the interpretation which a jury could have given the instruction')." *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985). The core holding of *Mills* is that jury instructions and/or verdict forms that prevent a single juror from giving effect to mitigating evidence violate *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As such it is critical to address the reasonable interpretations of the instructions, not what the Warden, or even the courts, think the instructions mean. *Mills v. Maryland*, 486 U.S. at 375-376.

In reviewing a mitigation phase jury instruction it is necessary to review the instruction actually given as well as the totality of the instructions. At Spisak's trial the jury was instructed:

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweigh the mitigating factors, then you must return that finding to the Court. I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.
>
> A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

Pet. App. 324a; Pet. App. 73a-74a (*Spisak*, 465 F.3d at 709-710). Throughout the proceedings the jury was repeatedly addressed in the collective "you" and instructed that every decision was to be the decision of the "jury." The jury was also specifically instructed that each of the two sets of verdict forms, whether for death or life, had to be unanimous. Pet. App. 325a (" . . . there is a spot for twelve signatures. All twelve of you will sign it if that is your verdict in this case.") -326a ("And again, all twelve of you must sign whatever verdict it is you arrive at [sic] must be signed in ink"); Pet. App. 74a-75a (*Spisak*, 465 F.3d at 710). Every instruction advised the jury that it had to be unanimous on decisions. At no point were the jurors instructed that a decision as to the existence of a mitigating factor was an individual, non-unanimous decision.

The primary concern with Ohio's instruction is the command that the jury unanimously reject the death penalty before considering a life sentence. The instruction is quite clear that the jury must first unanimously find that the state failed to prove that the aggravating circumstances outweighed the mitigating factors before the jury could consider a life sentence.[1] Under this instruction a single juror in favor of a death sentence would make it impossible

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[1] This type of instruction, which appears to be unique to Ohio, was subsequently declared unconstitutional under *Mills*. *State v. Brooks*, 75 Ohio St.3d 148, 161, 661 N.E.2d 1030, 1041-1042 (1996).

for the remaining, eleven individual jurors to give effect to the mitigating factors each of them determined to exist. This is especially problematic in this case as Spisak's counsel not only conceded the existence of the statutory aggravating circumstances, but argued extensively about non-statutory aggravators and told the jury this case had "all the aggravating circumstances you ever want" while at the same time diminishing the existence of the mitigating factors. Pet. App. 337a.

The impact of this instruction cannot be understated. A reasonable interpretation would result in one juror refusing to permit any discussion of life sentences and mitigation evidence because that juror was in favor of a death sentence. Any effort to discuss mitigation evidence would be rebuffed because that would entail a discussion of life sentences which is not permissible until the death penalty was unanimously rejected. As in *Mills*, "the possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at 384.

While it is possible that the jurors understood and applied the instructions in a manner that is constitutionally acceptable, it is just as possible that one or more of the jurors was mislead and misapplied the law. Given the high degree of certainty required in capital cases, *Mills*, 486 U.S. at 376; see also *Andres v. United States*, 333 U.S. 740, 752 (1948), there is a substantial probability that a juror in this

case was prevented from independently considering and giving weight to mitigation evidence as required by *Lockett* and *Eddings*. The Ohio Supreme Court's subsequent treatment of the acquittal-first instruction clearly demonstrates that Ohio's "acquittal-first" instruction violates *Mills*. *State v. Brooks*, 75 Ohio St.3d 148, 161, 661 N.E.2d 1030, 1041-1042 (1996). In *Brooks*, the Court invalidated this same instruction relying directly and explicitly on *Mills*.[2] See also *State v. Diar*, 120 Ohio St.3d 460, 491-92, 900 N.E.2d 565, 600-01 (2008) (state's concession that jury instruction violated *Mills* and required reversal). In *Brooks*, the Ohio Supreme Court ordered that future capital juries be affirmatively instructed that a single juror's vote for life prevents a death sentence. *Brooks*, 75 Ohio St.3d at 162, 661 N.E.2d at 1042.

Added to this concern is the fact that every instruction referring to the jury's determinations was couched in terms of unanimity: "Members of the jury, you have heard the evidence"; "The Court and jury have separate functions. You decided the disputed facts"; "Now, credibility. You are the sole judges of the acts"; "In this case the aggravating circumstance are the specifications upon which you returned guilty verdict"; "Mitigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as

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[2] *Brooks* is the first case in which the Ohio Supreme Court even cited *Mills* in a death penalty case.

extenuating or reducing the degree of the defendant's responsibility or punishment"; "You must state your finding as to each count uninfluenced by your verdict as to any other count"; "A summary of that section provides that you, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel." Pet. App. 313a-329a. It must be presumed that the jury understand the unanimity requirement to apply to every decision since there was never a contrary instruction. *Mills*, 486 U.S. at 378-379. There is simply nothing in these jury instructions or verdict forms that would have suggested to any juror that the unanimity instruction did not apply to every single jury determination, including the existence of mitigating factors or the impact of that evidence. The totality of the jury instructions were such that a reasonable juror would have understood the instruction to mean that a death sentence had to be unanimously rejected before a life sentence could be considered. As in *Mills*, the impact of this instruction is to preclude each individual juror from individually giving effect to the mitigation evidence.

Contrary to the Warden's assertion, the Sixth Circuit did not hold that states must give a specific instruction that the jury need not be unanimous as to the existence of mitigating factors. How states choose to structure jury instructions is typically left to the states. *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998) ("The State may shape and structure the jury's consideration of mitigation so long as it does not

preclude the jury from giving effect to any relevant mitigating evidence."). Requiring a specific non-unanimity instruction would run counter to the Court's directive. *Jones v. United States*, 527 U.S. 373, 381 (1999). See *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); *Duvall v. Reynolds*, 139 F.3d 768, 791-792 (10th Cir. 1998). The Circuit held, consistent with *Mills*, *Jones*, and *Buchanan*, that the jury instructions in their entirety were such that a reasonable juror could have improperly understood the instructions to require unanimity as to the existence of a mitigating factor before the factor could be considered in favor of a life sentence. This is a straight-forward application of *Mills*. Had Spisak's jury instructions included, as Ohio's model jury instructions now do, a specific instruction that one juror's vote against the death penalty would prevent a death sentence, the jurors understanding of his/her role would have been entirely different. It was the absence of this instruction, coupled with the instructions and verdict forms given, that created the reasonable probability that the jurors misapplied the law.

The Warden asserts that because the *Mills* jury instructions were not identical to Spisak's jury instructions the Ohio court decision is immune from review under AEDPA. *E.g.*, Pet. Br. 20 ("In fact, the jury was not told to make a specific *finding* on any of the mitigators; it was simply told to "consider[ ]" the mitigating factors. . . ."). This argument is the equivalent of saying that habeas relief could be

granted under *Strickland* only if the facts of the ineffectiveness claim were identical to those in *Strickland* itself. The Court's post-AEDPA jurisprudence demonstrates that the Warden misstates the standard. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Banks v. Dretke*, 540 U.S. 668 (2004); *Lockyer v. Andrade*, 538 U.S. 63 (2003). The general *Strickland* test applies to all ineffective assistance of counsel claims unless there is another precedent directly on point. *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419, 173 L. Ed. 2d 251, 262 (2009). Similarly, *Mills* applies to all jury instruction and/or verdict form cases unless a different precedent is directly on point.

AEDPA constrained, but did not eliminate, federal *habeas* review. The Court continues to recognize the importance of the Great Writ and the duty of the federal courts to give substantive review to *habeas* petitions. See *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). Even under the AEDPA changes to the Great Writ, "the province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. 137 (1803). The Court specifically recognized that ceding federal review to the states would render AEDPA unconstitutional. *Williams*, 529 U.S. at 378-79. See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be

evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing.") (emphasis in original).

"Clearly established Federal law" is defined as "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In *Musladin*, this Court addressed how some legal holdings are categorically defined by a narrow and conceptually limited number of factual distinctions while other broader and more general legal holdings allow for more numerous factual variations. For analytical purposes, defendants forced to wear prison garb and uniformed state troopers sitting collectively immediately behind the defendant reflected both a factually and legally distinct category from individual courtroom spectators wearing buttons carrying the likeness of the victim. The Court denied relief under § 2254(d)(1) because the former fact patterns characterized a clearly established legal holding about a defendant's right to a fair trial in the context of "state sponsored courtroom practices," unlike the button-wearing spectators, whose actions bore no relation to any official state action. As the Court noted, clearly established federal law "has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Musladin*, 549 U.S. at 76.

On the other hand, in the context of a broad and general legal holding such as *Strickland, Musladin* would obviously not prevent relief being granted except upon a showing that the facts of the ineffectiveness claim were near-identical to those in *Strickland* itself. *Accord*, *Musladin*, 549 U.S. at 80-81 (Kennedy, J., concurring) (notwithstanding the majority's conclusion that no prior Supreme Court holdings have addressed the constitutional implications of trial spectators wearing such buttons, "relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) would likely be available even in absence of a Supreme Court case addressing the wearing of buttons" if spectator conduct amounted to "intimidation" in violation of the well-established general "rule against a coercive or intimidating atmosphere at trial.").

This distinction recognizes the need to consider the categorical or conceptual limits of a Court's holding and was reiterated in *Panetti v. Quarterman*, 551 U.S. 930 (2007). "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Id.*, at 953 (quoting *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring in judgment). The Court's long history of reviewing capital jury instructions demonstrates that it applies to the panoply of instructions crafted by the states rather than the discrete instruction before the Court.

> As an overview of the cases both preceding and following *Penry I* demonstrates, we have

> long recognized that a sentencing jury must be able to give a "'reasoned moral response'" to a defendant's mitigating evidence – particularly that evidence which tends to diminish his culpability – when deciding whether to sentence him to death. *Id.*, at 323, 109 S. Ct. 2934, 106 L. Ed. 2d 256; see also *Abdul-Kabir*, ante, at ___-___, ___-___, 127 S. Ct. 1654, 167 L. Ed. 2d 585, 2007 U.S. LEXIS 4536. This principle first originated in *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), in which we held that sentencing juries in capital cases "must be permitted to consider any relevant mitigating factor," *id.*, at 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (emphasis added). In more recent years, we have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence. See *Abdul-Kabir*, ante, at ___-___, 127 S. Ct. ___, 167 L. Ed. 2d 585, 2007 U.S. LEXIS 4536.

Brewer v. Quarterman, 550 U.S. 286, 289 (2007); see also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

In *Mills*, as in *Strickland*, the Court specifically crafted a holding where the broad legal principles that defined the holding were clearly articulated so as

to encompass a myriad of factual situations which would fall under those clearly established broad legal principles. After making clear that in a capital case the sentencer may not be precluded from considering and giving effect to mitigation evidence, and that the issue under consideration was that a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, the Court enunciated that its holding was expressing a broad legal principle meant to be applied to the myriad of factual scenarios and contexts in which capital mitigation is considered throughout the country:

> Under our decisions, *it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, (citations omitted), by the sentencing court, (citations omitted), or by an evidentiary ruling. (Citations omitted).* The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. *Whatever the cause,* if petitioner's interpretation of the sentencing process [that a jury that does not unanimously agree on the existence of any mitigating circumstance results in a situation in which the jury or jurors may not give mitigating evidence effect], is correct, the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain

> violation of Lockett it is our duty to remand this case for resentencing. (Citations omitted).

Mills, 486 U.S. at 375. (Emphasis added). *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Smith v. Texas*, 543 U.S. 37 (2004); *Smith v. Texas*, 550 U.S. 297 (2007); *Abdul-Kabir*; *Brewer*.

In a related context interpreting the phrase "clearly established law" the Court has consistently held that "[T]o be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.'" *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633, 174 L. Ed. 2d 354, 366 (2009) quoting *Wilson v. Lane*, 526 U.S. 603, 615 (1999) (addressing the question of qualified immunity of state actors). Rather, the issue is whether the Court's statements were sufficiently clear to put officials on notice. *Hope v. Pelzer*, 536 U.S. 730, 41 (2002). Even the fact that there are "disuniform views of the law" does not render the law unclear. *Redding*, 174 L. Ed. 2d at 366.

The law of *Mills* as applied by the Sixth Circuit is clearly established. In fact, if Spisak's trial were conducted today and these instructions were given, the Ohio courts would reverse the death sentence as unconstitutional pursuant to *Mills*, and remand for resentencing. *Brooks*, *supra*. A reasonable interpretation of the jury instructions and verdict forms, considered in the totality, would prevent any

individual juror from giving effect to mitigating factors he or she determined to exist. In fact, a single juror in favor of death would prevent the remaining eleven jurors from giving effect to the mitigating evidence since a unanimous decision against death was required before a life sentence could be discussed. The judgment of the Sixth Circuit must be affirmed.

II. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

A. The Sixth Circuit did not apply *Cronic*'s presumption of prejudice to Spisak's ineffective assistance of counsel claim.

The Warden presents a different issue for this Court's review than that he presented in the petition. In his petition for a writ of certiorari the Warden asserted that the Sixth Circuit improperly applied *United States v. Cronic*, 466 U.S. 648 (1984), rather than *Strickland v. Washington*, 466 U.S. 668 (1984), to Spisak's ineffective assistance of counsel claim.

Petition at 23. The Court granted certiorari to review this question.[3] Rather than address the question upon which certiorari was granted, the Warden presents a bare plea that this Court correct a claimed incorrect application of *Strickland* to the facts of Spisak's case. The Warden's only citation to *Cronic* merely asserts that the Circuit applied it. Pet. Br. at 41-42. The Sixth Circuit did not improperly apply *Cronic* to Spisak's case but rather correctly reviewed the ineffective assistance of counsel claim through the lenses of *Strickland* and AEDPA.

It is clear that the Sixth Circuit did not apply *Cronic*. In *Bell v. Cone*, 535 U.S. 685 (2002), the Court made it clear that *Strickland* and not *Cronic* controls judicial review of the performance of counsel in closing argument. *Bell*, 535 U.S. at 697-98. The Sixth Circuit followed the dictate of *Bell* and applied *Strickland*'s two prong test. Throughout the Circuit's opinion reference is made directly to the *Strickland* standards. The very first sentence of the Circuit's opinion on this issue identifies *Strickland* as the controlling law. Pet. App. 60a (*Spisak*, 465 F.3d at 703). In each of the three opinions issued by the Circuit, the Court repeatedly referred to *Strickland* as the controlling authority. *Id.*; Pet. App. 16a (*Spisak v. Hudson*, 512 F.3d 852, 854 (6th Cir. 2008)) ("does not preclude this Court's finding that the state court

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[3] The caption for this issue now reads "Trial counsel's closing argument was not constitutionally ineffective under *Strickland*." Pet. Br. at 31.

unreasonably applied federal law as announced in *Strickland*."); Pet. App. 6a (*Spisak v. Hudson*, 2008 U.S. App. Lexis 7760, *6-7 (6th Cir. 2008)) ("this Court's holdings partially granting habeas relief relied on well-settled Supreme Court precedent regarding ineffective assistance of counsel at the sentencing phase of trials, i.e. *Strickland v. Washington*.").

When a court cites the correct legal standard it is presumed that the court actually applied that standard. "There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). See also *Bell v. Cone*, 543 U.S. 447, 455-456 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee v. Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam). There is no evidence that the Circuit did not do what it said it did – correctly apply the well-settled *Strickland* standards to this case.

The Warden concedes that the Circuit applied *Strickland* to the performance aspect of this case. Pet. Br. at 31 (beginning discussion with *Strickland*). The Warden only claims that the Circuit improperly applied *Cronic*'s presumption of prejudice. Pet. Br. at 41-42. The Circuit, however, did not presume prejudice but applied *Strickland*'s prejudice standard.

Pet. App. 67a (*Spisak*, 465 F.3d at 706) ("Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death"). This is precisely the standard enunciated by this Court in *Strickland. Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Although the Circuit did cite its earlier case, *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), which referenced *Cronic*, the Circuit did so solely in discussing the performance prong of *Strickland*. Pet. App. 66a (*Spisak*, 365 F.3d at 706).[4] The use of *Rickman* simply demonstrated how poorly Spisak's counsel's performance really was. ("Here, as in *Rickman*, trial counsel's hostility toward Defendant aligned counsel with the prosecution against his own

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[4] As the Circuit noted:

> In *Rickman*, counsel pursued a similar strategy of attempting to portray his client as a "sick" and "twisted" individual which should mitigate the death sentence. Trial counsel's strategy in *Rickman* involved repeated attacks on his client's character, eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. [citation omitted]. The court concluded that counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. [citation omitted].

Pet. App. 65a-66a.

client. Much of Defendant's counsel's argument during closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." Pet. App. 66a). Since the performance prong of *Cronic* and *Strickland* are the same, the reference to *Rickman* is perfectly appropriate. The Circuit concluded its performance prong analysis citing *Strickland*, and indicating that "[i]n light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the 'strong presumption' that counsel's actions constituted 'sound trial strategy.'" Pet. App. 66a. *Id.*[5]

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[5] Prior to *Spisak*, the Sixth Circuit repudiated the application of *Cronic* it applied in *Rickman*, while still recognizing the validity of the performance-prong analysis. In *Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001), the Circuit had cited authoritatively to *Rickman*'s application of *Cronic*. Two years later, in *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), reh'g and sugg. for reh'g en banc denied 11-25-2003, the Circuit noted that whereas in *Cone* the court considered the "complete abdication" of counsel's penalty phase advocacy "we are mindful of the Supreme Court's opinion in *Bell v. Cone*, [535 U.S. 685 (2002)]," which reversed a grant of the writ by the Circuit court and applied *Strickland*. The *Johnson* court specifically noted that the Supreme Court "reminded us that 'a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.'" *Johnson*, 344 F.3d at 573 (citing to *Cone*, 122 S. Ct. at 1854 (citing *Strickland*)).

(Continued on following page)

At no point in any of the three opinions did the Circuit cite to *Cronic*. The Circuit repeatedly and specifically stated it was reviewing the claim under *Strickland*, identified the two-prong test of *Strickland*, never cited *Cronic*, and did not presume prejudice. The Warden concedes that the Circuit applied *Strickland* to Spisak's other ineffective assistance claim. Pet. Br. at 42. It cannot be presumed that the Circuit would apply the *Cronic* standard (without citation and while citing *Strickland*) in one paragraph and then switch to the *Strickland* standard (with express citation to *Strickland*) in the very next paragraph. Pet. App. 66a (*Spisak*, 465 F.3d at 706). Since the Circuit applied the proper test to the specifics of this case the judgment should be affirmed.

B. The Circuit properly reviewed this claim under *Strickland* and AEDPA standards.

1. State Court Decision

Spisak's challenge to the closing argument of counsel was raised on direct appeal to the Ohio courts. Spisak raised this claim in his 57th Proposition of Law to the Ohio Supreme Court. The

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There is no reason to assume that the Circuit reapplied *Cronic* in *Spisak* and forgot the lesson it acknowledged three years earlier.

Ohio Supreme Court summarily rejected this claim together with 48 other Propositions without analysis:

> In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one, twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer, supra*; *Donnelly v. DeChristoforo* (1974), 416 8 U.S. 637; *Darden v. Wainwright* (1986), 477 U.S. 168; *Strickland v. Washington* (1984), 466 U.S. 668; *Evitts v. Lucey* (1985), 469 U.S. 387; *State v. Smith* (1985), 17 Ohio St.3d 98, 17 OBR 219, 477 N.E.2d 1128; *State v. Lytle* (1976), 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *State v. Staten* (1969), 18 Ohio St.2d 13, 47 O.O.2d 82, 247 N.E.2d 293; *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, 23 OBR 295, 491 N.E.2d 1129 (distinguished); *Payton v. New York* (1980), 445 U.S. 573 (distinguished); *Rawlings v. Kentucky* (1980), 448 U.S. 98; *State v. Rogers* (1986), 28 Ohio St.3d 427, 28 OBR 480, 504 N.E.2d 52, paragraph one of the syllabus (*Rogers* II), reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *Buell, supra*; *Wainwright v. Witt* (1985), 469 U.S. 412; *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus (*Rogers* I),

reversed on other grounds (1987), 32 Ohio St.3d 70, 512 N.E.2d 581; *State v. Williams* (1983), 6 Ohio St.3d 281, 6 OBR 345, 452 N.E.2d 1323; *State v. Williams* (1986), *supra*; *State v. Byrd* (1987), 32 Ohio St.3d 79, 512 N.E.2d 611; *State v. Kidder* (1987), 32 Ohio St.3d 279, 513 N.E.2d 311; *Illinois v. Allen* (1970), 397 U.S. 337; *State v. White* (1968), 15 Ohio St.2d 146, 44 O.O. 2d 132, 239 N.E.2d 65, paragraph two of the syllabus (distinguished); Evid. R. 404(B); *State v. Spikes* (1981), 67 Ohio St. 2d 405, 21 O.O. 3d 254, 423 N.E. 2d 1123; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 24 O.O.3d 316, 436 N.E.2d 1001; *State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E.2d 267; *Maurer*, *supra*, paragraph seven of the syllabus; *State v. Graven* (1977), 52 Ohio St.2d 112, 6 O.O.3d 334, 369 N.E.2d 1205; *State v. Adams* (1980), 62 Ohio St.2d 151, 16 O.O.3d 169, 404 N.E.2d 144; *State v. Thompson* (1981), 66 Ohio St.2d 496, 20 O.O.3d 411, 422 N.E.2d 855 (distinguished); *State v. Mann* (1985), 19 Ohio St.3d 34, 19 OBR 28, 482 N.E.2d 592; *State v. Ferguson* (1983), 5 Ohio St.3d 160, 5 OBR 380, 450 N.E.2d 265; *Estelle v. Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359; *Steffen*, *supra*; R.C. 2945.39(D); *Doyle v. Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright v. Greenfield* (1986), 474 U.S. 284 (distinguished); *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583; *Carter v. Kentucky* (1980), 450 U.S. 288 (distinguished); *State v. Price* (1979), 60 Ohio

> St.2d 136, 14 O.O. 3d 379, 398 N.E.2d 772, paragraph four of the syllabus; *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1257 (distinguished); *Chapman v. California* (1967), 386 U.S. 18.
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> . . .
>
> In summary, we find no merit in the propositions of law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme.

Pet. App. at 306a-309a. The court included *Strickland* in that string-cite, but it provided no explanation or analysis justifying its conclusion.

Despite this complete lack of analysis, the Warden asserts the "state court's treatment of the claim was reasonable," Pet. Br. at 31. This bare assertion ignores the court's summary dismissal of forty-nine claims, including the ineffective assistance claim, in one paragraph of string citations, and ignores the complexity of review required under *Strickland*. The Ohio Supreme Court did not explain how or why it denied relief and it is impossible to know which of five possible scenarios might reflect the court's reasoning:

> Spisak failed to demonstrate both deficient performance and prejudice;
>
> Spisak demonstrated deficient performance but not prejudice;

> Spisak demonstrated prejudice but not deficient performance;
>
> Spisak did not demonstrate deficient performance so there was no need for prejudice review; or
>
> Spisak did not demonstrate prejudice so there was no need for deficient performance review.

These separate and distinct rationales are important for addressing whether the Sixth Circuit exceeded its authority under AEDPA. Each separate rationale implicates AEDPA review in a different way. Only the first scenario, assuming a full review on the merits of the claim, would subject the state court's denial to full AEDPA constraints. However, the second and third possible rationales would necessitate different implications for *habeas* review as the federal court would be obligated under AEDPA to accept the state court determination that counsel was either deficient as in the second scenario, or that prejudice resulted as in the third scenario. See *Rompilla v. Beard*, 545 U.S. 374, 390 (2005). Similarly, the fourth and fifth rationales remove AEDPA constraints for those prongs of *Strickland* the state courts failed to review. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).[6] Given the complexity and

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[6] The uncertainty as to which AEDPA analysis is mandated as a result of the Ohio court's summary treatment of Spisak's claim undermines Amici's admonition that the federal habeas

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multi-level analysis necessary to review an ineffective assistance of counsel claim the state court's cursory and unexplained treatment of this claim is not entitled to the AEDPA standards of review. Instead, Spisak's claim should be subjected to *de novo* review. See *Knowles v. Mirzayance*, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009). The Sixth Circuit's analysis of the merits of this claim demonstrate that Spisak is entitled to the Writ.

Alternatively, the Circuit applied AEDPA deference in spite of the analytical deficiency of the state court opinion and concluded that Spisak had been denied the effective assistance of counsel at the penalty phase.[7] Pet. App. 32a (*Spisak*, 465 F.3d at

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court "must take particular care not to improperly disturb the result [of a state court's decision] when the state court has properly discharged it responsibilities." Brief for the States of Pennsylvania *et al.* as *Amici Curiae* 17. Earlier, discussing the *Mills* claim, (which was similarly decided in summary fashion), *Amici* argued for a "rigorous enforcement of AEDPA's provisions," arguing that "[t]he decisions of state jurists who have faithfully discharged their obligations to interpret and apply the Constitution should not be disregarded or discarded, especially not based on a fanciful view of the contours of this Court's rulings." Brief for the States of Pennsylvania *et al.* as *Amici Curiae* 11. Certainly, the summary manner in which the Ohio Supreme Court disposed of all of Spisak's claims was not what AEDPA envisioned for a state court that conscientiously seeks to discharge its responsibilities under the federal Constitution.

[7] Similarly, in its Amended Order subsequent to this Court's initial remand, the Circuit noted that Spisak's sentence resulted from an unreasonable application of federal law as announced by the Supreme Court, and that he had "therefore overc[o]me

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690-91). Because the Circuit applied the most restrictive standard of review to this claim and determined that the summary state court decision was an unreasonable application of *Strickland,* the judgment of the Circuit must be affirmed.

2. Closing Argument

Trial counsel faced an admittedly difficult case in closing argument in the penalty phase. Spisak had been convicted of terrible crimes and during the culpability phase had repeatedly expressed outrageous social and political views. Nevertheless, the Eighth Amendment requires individualized sentencing in capital cases, when the jury must assess whether the death penalty is appropriate under the individual circumstances of the particular case. *Lockett v. Ohio*, 438 U.S. 586 (1978). The death penalty is reserved for "the worst of the worst." Defense counsel in a capital case is going to face difficult facts, emotions, and pressures. Rather than diminishing counsel's obligations, this enhances the need for competent and effective counsel. *Powell v. Alabama*, 287 U.S. 45 (1932); *McFarland v. Scott*, 512 U.S. 849, 855 (1994); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra Law Review 913, 922 (2003) ("Today, it is universally

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the high bar for habeas relief" established by AEDPA. Pet. App. 4a-5a.

accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master."). Counsel's attacks on his client in closing argument constituted an abandonment of competent and effective advocacy.

The unique role of counsel in closing argument was recognized long before *Strickland*. *Herring v. New York*, 422 U.S. 853 (1975). The need and power of closing argument in a capital case cannot be understated. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact-finding process, *no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.*" *Id.*, at 862 (emphasis added). Closing argument in a criminal trial is so important that the Sixth and Fourteenth Amendments prohibit states from denying closing argument by counsel. *Id.*

It is undisputed that the right to effective assistance of counsel attaches to the closing argument in a capital case. *Herring*; *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Cone v. Bell*, 535 U.S. 685 (2002). Under *Strickland*, the first focus must be on the argument actually made and whether the performance of counsel fell below professional norms. A substantive review of the closing argument

demonstrates that the Circuit's analysis under the Sixth Amendment is correct.

3. Deficient Performance

The Warden conflates "strategy" with "goal". "Goal" is "the end toward which effort or ambition is directed." Webster's Third New International Dictionary 927 (1966). "Strategy" is "the art of devising or employing plans or stratagems toward a goal." Webster's Third New International Dictionary 2256 (1966). In the mitigation phase of a capital case the "goal" is to save the client's life. The "strategy" is the tactic, argument, evidence, and case presented to the jury to convince it to return a life sentence. It is not enough to assert that closing arguments involve strategic decisions as this is axiomatic. Just as a reviewing court must consider the "reasonableness of the investigation said to support that strategy", *Wiggins*, 539 U.S. at 527, the court must consider the reasonableness of the closing argument actually made in support of the strategy.[8] *Yarborough v. Gentry*, 540 U.S. 1, 6-10 (2003).

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[8] Any conclusion on counsel's "strategy" is pure speculation. Spisak sought an evidentiary hearing and factual development of this claim in state post-conviction and was denied. This claim was dismissed on the state's motion on the grounds that it had been litigated on direct appeal and therefore was *res judicata* in post-conviction. *State v. Spisak*, Case No. 67229, 1995 Ohio App. Lexis 1567, *10-12 (8th Dist. April 13, 1995).

Simply because counsel made the strategic decision to present a closing argument does not end counsel's Constitutional obligation. *Wiggins*. The question raised is whether counsel was ineffective in delivering the closing argument. *Wiggins*. Counsel must present a closing argument that advances his client's cause rather than supporting the state's case. Counsel must effectively develop and present the closing argument. *Yarborough*, 540 U.S. at 6 ("Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact.'") "Final argument is the advocate's only opportunity to tell the story of the case in its entirety, without interruption, free from most constraining formalities." Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, 385 (1993). It is the implementation of the strategy that is at issue and counsel's argument denigrated his client, his history, his psychological background. *Wiggins*.

The effectiveness of a closing argument is measured through two questions:

1. "Does it make the jury *want* to find for your client?" and,

2. "Does it tell the jury *how* to find for your client?"

Keeton, *Trial Tactics and Methods*, 273 (2nd ed. 1973). The argument delivered in this case did neither.

In his closing argument, counsel suggested to the jury there might be no mitigation:

> You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, and before the prosecution rushes to point out, if any, let me add a comma, and say, if any. That's probably the first thing you have to find. Let's talk first about the aggravating factors. I suppose so much could be said, but so little really needs to be said about the degree of the aggravating factors, clearly horrendous. Pet. App. 333a.

During the closing argument Spisak's counsel made comments that focused the jury upon the sheer brutality of the crimes.

> a) . . . And we can feel that, or see the cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is . . . And, ladies and gentlemen, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will the urine. You are in the bathroom, and it is death, and you can smell the death. Pet. App. 334a.

> b) . . . And we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses [worn by Spisak] and looked into the muzzle of a gun that kept spitting out bullets. . . . And we all went through the surgery, and we were all kind of with John Hardaway when he came in here and he's still got some physical

problems, and we can all feel those, and we are not going to forget. Pet. App. 334a- 335a.

c) . . . and we all know the terror [of Coletta Dartt], or we can feel that right in the pit of our stomach. . . . But we were there and we know how she feels. And it is an aggravating circumstance, indeed it is, ladies and gentlemen. Pet. App. 335a.

d) . . . on the 27th of August we were in another lavatory, and we were all there because we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they felt, because ladies and gentlemen we participated, and we were there. Pet. App. 335a.

e) . . . on the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never knew what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance. And we were there. Pet. App. 335a.

f) . . . We were with [the Petitioner] when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw

> hat fell off. And, ladies and gentlemen, would you ever want any more aggravating circumstances? I don't think that you would. Pet. App. 336a.
>
> g) . . . There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky [because they survived] Lucky, if you have a nightmare that will never go away. That's lucky, it may be, but it's an aggravating circumstance. Pet. App. 336a.

During this closing argument counsel also made the following comments about his client:

> a) . . . And, ladies and gentlemen, that's what you have got to weigh, the aggravating circumstances against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years or fifty years, you are always going to be another Spisak juror . . . Isn't what you heard just a microcosm of a twelve year reign of terror that was unparalleled in history, the Third Reich. . . . Pet. App. 336a-337a.
>
> b) . . . And listen to this sick distorted mind, and you will hear once again kind of a muffled dissent, but those hobnail boots on the cobblestone streets, but ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't

admit, you won't hear the gas at Buchenwald, and you won't hear the gas in Auschwitz, because ladies and gentlemen, it never made any noise in killing six million. Aggravating circumstances, all the aggravating circumstances you ever want. Pet. App. 337a.

c) . . . Turn and look at [Spisak]. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford. Pet. App. 338a.

d) . . . Sympathy, of course, is not a part of your consideration. And even if it was, certainly, don't look to [Spisak] for sympathy, because he demands none. And ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. Pet. App. 338a.

e) . . . And ladies and gentlemen, don't look to [the Spisak] with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is

> never going to be any different. Pet. App. 339a.

Counsel limited consideration of any mitigating factors to one:

> a) The question then comes up, ladies and gentlemen, is there any mitigation . . . Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves . . . If there is any reason, if there is any reason, ladies and gentlemen, for you to go back and not come back immediately and say, "Judge, we recommend to you that you electrocute Frank Spisak," it is going to be that which is within ourselves, that's that which makes us different. Pet. App. 339a.
>
> So if we find a mitigating factor, ladies and gentlemen, it is nothing from within this sick tormented body, it is within ours. Pet. App. 339a.

Counsel ended telling the jury that he, the prosecutors, the Judge, and the policemen involved would all be proud of the jury, "whatever you do." Pet. App. 360a.

The only reference to Spisak's severe gender identity issues was a passing reference whereby counsel demeaned Spisak's ability to get along with his neighbors, "not knowing if [Spisak was] a fag or a transvestite." Pet. App. 354a.

The only portion of counsel's thirty page closing argument dedicated in any way to a discussion of mitigation evidence amounted to three pages on the "pride within ourselves," that the jurors could take as a result of our being a humane people, (Pet. App. 339a-341a), and four pages on the "smaller jar" of mental illness. (Pet. App. 342a-344a).[9] Counsel graphically detailed for six pages statutory and non-statutory aggravating circumstances, (Pet. App. 333a-338a), and argued over two pages that specific mitigating factors (sympathy, good deeds, good thoughts, ability to be rehabilitated), did not exist in Spisak. (Pet. App. 338a-339a). The bulk of the argument, twenty pages, was dedicated to thanking the players, (Pet. App. 331a-333a), and a rambling and disconnected final seventeen pages, (Pet. App. 344a-361a), which included identifying the victims' families sitting in the back of the courtroom, indicating how "torn up" they all were, and telling the jury in that context it was "awfully important" what they did. (Pet. App. 359a).

Not once did counsel request a life sentence for Spisak.

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[9] As counsel explained, the big jar that the defense did not fill up was Spisak's incompetence to stand trial, the middle jar, which the defense also could not fill up was an insanity defense, and the "smaller jar" the defense was seeking to fill up was the mitigating factor of Spisak's mental illness and whether it substantially impaired his ability to know wrongfulness or refrain from acting. Pet. App. 342a.

Under Ohio law aggravating circumstances are strictly controlled by statute. Only the specifically identified and indicted circumstances in O.R.C. § 2929.04(A) are before the jury for consideration in favor of death. The nature and circumstances of the killings themselves may not be considered as aggravating circumstances. *State v. Williams*, 99 Ohio St.3d 493, 515 (2003), citing *State v. Wogenstahl*, 75 Ohio St.3d 344, 356 (1996). The prosecutor is not permitted to argue non-statutory aggravating circumstances. There could never be a strategic reason for defense counsel to argue that inflammatory non-statutory aggravating factors should also be weighed on death's side of the equation. Counsel's role is to remove or rebut aggravating circumstances, *Rompilla*, not add to them.

Nonetheless, counsel spent significant time arguing and explaining to the jury that it should consider non-statutory aggravating circumstances such as the nature and circumstances of where and how the victims died, Pet. App. 334a; the feelings the deceased victims must have felt being shot, Pet. App. 335a;[10] the fear the victims who survived surely felt, Pet. App. 334a-336a; the impact the killings had on

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[10] Ohio courts have long held that it is improper for prosecutors to speculate about what the victim was thinking when killed. *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991); *Wogenstahl, supra*, 75 Ohio St.3d at 357-758.

the victims' families, Pet. App. 335a-336a,[11] and Spisak's outrageous and inflammatory political and social views including graphic references to the Nazi regime, "Crystal Night," and the death camps. Pet. App. 336a-337a. Counsel concluded with the comment, "Aggravating circumstances, all the aggravating circumstances you ever want." Pet. App. 337a.

In support of his argument that there was a legitimate strategy to this oratory the Warden relies on *Cone v. Bell,* suggesting a contextual similarity because "[t]he State had near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings." Pet. Br. 32 (citation omitted). However, *Cone v. Bell* was a Tennessee case and Tennessee law includes a statutory aggravator that the murder was "especially heinous, atrocious, or cruel [HAC] in that it involved torture or depravity of mind." Tenn. Code Ann. § 39-2404(I). In *Cone*, the nature and circumstances of the homicides were legitimate arguments for consideration in the sentencing decision. Ohio does not have a HAC statutory aggravator. Under Ohio law the nature and circumstances of the homicide can only be considered mitigating or not at all, *Wogenstahl*, and Spisak's counsel's argument was egregious and erroneous under Ohio law. It directly placed the

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[11] The suffering inflicted upon the families of the homicide victims was improper. *Williams, supra*, citing generally to *State v. White*, 85 Ohio St.3d 433, 445-446 (1999); *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998).

nature and circumstances before the jury as non-statutory aggravators in a way that the prosecution never could.

Because Ohio is a weighing state counsel must present and assert the existence of some substantive mitigation to be weighed or the scales automatically tip in favor of death. Immediately prior to beginning his discussion of mitigating factors to be considered counsel admonished the jury:

> Turn and look at Frank Spisak. He has been here for six weeks now. And you probably haven't really looked at him. Turn and look at him. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay.

Pet. App. 338a. Rather than assert the many mitigating factors that were present counsel told the jury that there could never be enough mitigating factors to justify a sentence less than death. Counsel abdicated his role as defense counsel and assumed the role of a prosecutor.

Counsel began his discussion of mitigating factors by defining mitigation as "anything that the defense might consider to be mitigating, good deeds

that a person might have done, and otherwise good life."[12] Pet. App. 338a. But Counsel then proceeded to tell the jury *not* to consider those specific factors by arguing "don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none." Pet. App. 338a. Counsel further told the jury "don't look to him for sympathy, because he demands none." Pet. App. 338a. Counsel summed up his description of Spisak: "He is sick, he is twisted. He is demented, and he is never going to be any different." Pet. App. 339a.[13] Rather than humanizing and giving the jurors a reason to spare Spisak's life, counsel demonized Spisak and heaped non-statutory aggravators on death's side of the equation.

In the one instance counsel did advocate for mitigation he told the jury it had nothing to do with Spisak, explaining that there "is only one reason, ladies and gentlemen, pride." Pet. App. 339a. Counsel told the jury that the only reason not to kill Frank Spisak was because "[W]e are a humane society." Pet. App. 339a. In his argument counsel did not reference

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[12] This demonstrates counsel's basic misunderstanding of mitigation evidence as it often entails things that are not "good" including childhood abuse, mental illness, mental retardation, and adaptability to jail (often demonstrated by prior incarcerations). *Wiggins*; *Penry*; *Skipper v. South Carolina*, 476 U.S. 1 (1986).

[13] To the contrary, the Court Clinic expert Dr. Phillip Resnick had concluded in his pre-trial competency report that Spisak's disturbed thinking and psychiatric symptoms had "improved substantially since he has been incarcerated." JA 676.

a single fact about Spisak's severe personality and gender identity disorders, (beyond suggesting the confusion caused to Spisak's neighbors "not knowing if [he was] a fag or a transvestite," Pet. App. 354a). Counsel only restated in passing one doctor's conclusion that Spisak was mentally ill and was substantially impaired. Pet. App. 343a. Counsel gave no explanation of the nature of Spisak's significant mental illnesses, how those illnesses related to either his social and family background or the crimes, or how the jurors should weigh those illnesses against the aggravating circumstances. In fact, counsel suggested the only reason the jury could consider the mental illness was not because Spisak deserved the consideration but because it was legislatively mandated: "You are allowed to make that consideration, not because of anything nice he did, not because of anything good he did, and not because he has a nice mother, or a nice wife, or a nice sister, and not because maybe he used to feed the pigeons on Public Square, or some other good deed, but because from within ourselves as a people we have instructed our General Assembly to make that inability, that substantial inability a mitigating circumstance." Pet. App. 343a-344a.[14]

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[14] Under Ohio law, one statutory mitigator is that the defendant lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Ohio Rev. Code § 2929.04(B)(3).

As noted, this passing reference to mental illness was placed into a context of filling the "smaller jar," which was itself couched in terms of defeat. Counsel told the jury that it had to first find it mitigating, then find it was "in that small jar" and then find it "outweigh[ed] the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us." Pet. App. 342a.

Counsel closed his argument with an extensive, and unusual discussion of his acknowledged failure to meet with the defense experts, the extraneous factors that may or may not be aggravating, and an extensive statement about counsel's pride in being a lawyer. Pet. App. 344a-361a.

Counsel's closing argument was neither reasonably conceived nor competently and effectively delivered. Counsel failed to advance any of Spisak's compelling mitigation themes, provide the jury with any coherent reason to even consider a life sentence, and argued additional reasons to impose a death sentence: "a good argument *argues*! An argument takes your themes, your theory of the case, the supporting evidence, and the law and molds them into a persuasive whole. It is logic and emotion brought together. An effective argument makes the jurors want to do what you want and to feel good about it afterwards." Mauet, *Trial Techniques*, 391 (7th Ed. 2007). The role of defense counsel is to stand with the defendant when no one else does. Defense counsel sacrifices his most basic duty when he joins the outcry against the defendant and that is exactly

what Spisak's counsel did in this case. By using the pronoun "we" to describe the emotions and reactions to the case he repeatedly aligned himself with the victims and the state against Spisak.

Counsel presented Spisak to the jury as a crazy, twisted, sick, demented, Nazi, "fag or transvestite." Counsel had evidence readily at hand to present Spisak as significantly mentally ill. Even the state's experts recognized Spisak suffered from significant psychological problems. Abandoning arguments based on compelling and well-recognized mitigating factors in favor of demonizing Spisak with degrading and derogatory epithets could only have harmed Spisak's case. It is difficult to imagine a more effective presentation and argument being made by the prosecution to assure that a sentence of death *would* be imposed. Counsel's conduct fell well below the prevailing professional norms requiring loyalty and advocacy on behalf of the client, not on behalf of the state. Such conduct violated Spisak's Sixth Amendment right to loyal counsel and undermined the reliability of Spisak's sentencing process.

By any reasonable interpretation of counsel's performance it was deficient, and assuming *arguendo* the Ohio Supreme Court's summary and unexplained denial of this claim was based upon an analysis that Spisak failed *Strickland*'s first prong, the decision was an unreasonable application of *Strickland*.

4. Prejudice

Eighth Amendment jurisprudence has long held that individualized sentencing in capital cases is necessary because not every person who commits a murder is deserving of the death penalty. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Regardless of the circumstances, it is never acceptable to abandon individualized sentencing in favor of a mandatory death penalty. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Sumner v. Shuman*, 483 U.S. 66 (1987). No capital defendant, no matter how terrible the facts or unsympathetic the defendant, is automatically subjected to a death sentence. The Warden's argument that nothing counsel did could be prejudicial once Spisak testified ignores both the clear dictates of *Woodson* and *Lockett* and the compelling mitigation evidence presented in this case. There was significant social history and mental health evidence available, much of it rendered by state employees of the Court Clinic, that, properly argued, would have explained Spisak's bizarre and outrageous behavior in the courtroom as well as the crimes.

Every mental health professional involved in this case diagnosed Spisak with a mental illness and severe personality disorders including schizotypal personality disorder, JA 463, 675, 719, 738; Identity Disorder and Gender Identity Disorder, JA 729; Atypical Personality Disorder with grandiose and aggressive features, JA 729; Atypical Psychotic

Disorder, JA 738; and Borderline Personality Disorder. JA 463. Schizotypal disorder, a forerunner to schizophrenia, "describes one who has profound disturbances in his thought process, in their perception, in their behaviors. It describes one who, much like Mr. Spisak, has a rather withdrawn and isolated lifestyle, has eccentric, or has been in eccentric thinking, or has severe difficulties in interrelationships, and with dealing with day-to-day living." JA 530.

Spisak's Naziism and his troubling belief system towards minorities was directly attributed to his mental illnesses. JA 681-682 (Dr. Althof); 719 (Dr. Bertschinger); 469, 480, 704 (Dr. McPherson); 725, 732 (Drs. Samy and Koerner). Had counsel's closing argument focused on the diagnoses of schizotypal and sexual dysphoria and how these mental illnesses impacted Spisak's troubled thought processes instead of focusing on statutory and non-statutory aggravating circumstances, calling his client names, and completely marginalizing the mental health evidence, there is a reasonable probability that one juror would have voted for a life sentence.

The closing argument was not a minor piece of the case the Warden attempts to portray. Rather, the closing argument "should sharpen and clarify the issues." *Herring*, 422 U.S. at 862. Especially in a case like this one, "no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* Not once could counsel

bring himself to ask the jury to return a life sentence. Not once did counsel speak sympathetically about his client's tremendous struggles throughout his entire life with his sexual identity. Not once did counsel attempt to explain the relationship between these stresses and the awful Nazi persona that Spisak displayed when given the opportunity. As the Circuit analyzed, the final moments of the closing argument "were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation," but rather "focused on the importance of the jury's decision to [all the other participants in the trial] instead of arguing how and why the mitigating factors outweighed the aggravating factors." Pet. App. 65a.

Counsel concluded with "whatever you do, we are going to be proud of you." Pet. App. 360. Nothing could be more prejudicial to a capital defendant than his own counsel standing before the jury having heaped hate and vitriol on him. This is especially so because the jurors were instructed specifically "that you, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing *and the arguments of counsel.*" Pet. App. 323a (emphasis added).

Counsel's argument had no relationship to the compelling mitigation evidence presented: "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered [i.e.,

unexplained] 'mitigation evidence, taken as a whole, "might well have influenced the jury's appraisal" of [Spisak's] culpability.'" *Rompilla*, 545 U.S. at 393.

The Warden argues that the Circuit's entire prejudice analysis was confined to one conclusory sentence. Pet. Br. 41. In actuality, the Circuit clearly explained why counsel's conclusory remarks were prejudicial and not strategic in nature. The Circuit fully accepted the viable strategic possibility that "once counsel identified with [the jury's] emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill." Pet. App. 64a. (*Spisak*, 465 F.3d at 705.) The Circuit acknowledged this could have been a "permissible trial strategy" *had counsel actually done that*, and if, in the course of argument, counsel had "spent a substantial amount of time humanizing and rehabilitating Defendant in the eyes of the jury by arguing that Defendant was misguided or mentally ill and deserved to have his life spared." *Id.*

But counsel did not do any of that prejudicing Spisak:

> The record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury. Instead . . . trial counsel further denigrated Defendant and even went so far as to tell the jury that Defendant was undeserving of mitigation.

Pet. App. 64a. (*Spisak*, 465 F.3d at 705.)

Had counsel presented a competent closing argument explaining the nature of the mental illness, their direct relationship to the crimes and Spisak's beliefs, and advocating directly for a life sentence, there is a reasonable probability that at least one juror would have been swayed to spare his life. Assuming *arguendo* that the state's summary and unexplained decision denied the ineffectiveness claim upon a merits review of *Strickland*'s second prong, the inflammatory and derogatory comments of counsel along with the existence of substantive mitigation evidence neither referenced nor argued renders the state court determination an unreasonable application of *Strickland*.

5. Conclusion.

An axiom of argument is that rarely is a case won at argument but many cases are lost there. This is clearly what happened in this case. Counsel's argument not only gave the jury no reason not to sentence Spisak to death, but affirmatively drove the jury to impose a death sentence. For the above stated reasons, Spisak requests the Court affirm the ruling of the Sixth Circuit and order the Writ as to the death sentence because counsel rendered ineffective assistance of counsel during the closing argument of the mitigation phase of the case and Spisak was prejudiced by counsel's deficient performance.

CONCLUSION

As outlined above, the Sixth Circuit fully, properly, and thoroughly reviewed Spisak's claims. The Circuit applied the standards of § 2254(d)(1) and determined that the state court decision denying sentencing relief as to the jury instructions and the deficient and prejudicial performance of counsel were contrary to or an unreasonable application of Constitutional law. Spisak is entitled to *de novo* review of his ineffective assistance of counsel claim as the state court summary disposition is not entitled to AEDPA standards of review. Because there is a reasonable probability that a juror misapplied the jury instructions as to mitigation evidence and a life sentence, and/or because counsel's closing argument was deficient and prejudiced Spisak, the Court should affirm the granting of the Writ.

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REPLY BRIEF

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In the Supreme Court of the United States

KEITH SMITH, Warden,
Petitioner,

v.

FRANK G. SPISAK, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent Frank G. Spisak, Jr., presents the very same analysis that this Court rejected two years ago when it remanded this case in light of *Carey v. Musladin*, 549 U.S. 70 (2006), and *Schriro v. Landrigan*, 550 U.S. 465 (2007). Given the absence of support for Spisak's "acquittal first" rule, the deferential manner in which closing arguments are reviewed, and the standards of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Sixth Circuit erred in granting habeas relief. This Court should reverse.

A. Spisak's jury instructions were consistent with *Mills v. Maryland*.

Mills v. Maryland, 486 U.S. 367 (1988), provides that a State may not condition a juror's consideration of a relevant mitigating factor upon agreement from "all 12 jurors . . . on the existence of a particular such circumstance." *Id.* at 384. Even though this Court has explained that this rule "applies fairly narrowly," *Beard v. Banks*, 542 U.S. 406, 420 (2004), Spisak asserts that *Mills* broadly prevents the States from asking jurors first to reach a unanimous decision on the question of death before they consider life-sentence options. (Br. 24). The jury must understand, Spisak says, that "one juror's vote against the death penalty would prevent a death sentence." (Br. 25).

Spisak's approach would not just expand *Mills*; it would give a single juror a veto power that *Mills* never contemplated. The lesson of *Mills* is that one juror's decision to reject a mitigating factor may not preclude other jurors from accepting and weighing that same factor. *Mills* does not bar instructions

that ask the jury to reach consensus on the ultimate question—whether death is an appropriate punishment. Spisak reaches a different result only by misrepresenting Ohio case law, misreading this Court's precedents, and ignoring AEDPA.

1. Spisak's jury instructions complied with Ohio Supreme Court precedent.

Throughout his brief, Spisak claims that the Ohio Supreme Court already has found the jury instructions at issue in this case unconstitutional under *Mills*. (Br. 21, 23, 31) (citing *State v. Brooks*, 661 N.E.2d 1030 (Ohio 1996)). This assertion is factually and legally incorrect.

First, the Ohio Supreme Court has never invalidated the penalty-phase instructions used at Spisak's trial. In *Brooks*, the court reversed a death sentence because the trial court gave the following instruction: "'You are now required to determine unanimously that the death penalty is inappropriate before you can consider a life sentence.'" 661 N.E.2d at 1040. Four months later, the Ohio Supreme Court considered a challenge to jury instructions that were similar—indeed, nearly verbatim—to the instructions at Spisak's trial. *State v. Davis*, 666 N.E.2d 1099, 1108-09 (Ohio 1996). The *Davis* court clarified that the deficiency in *Brooks* was limited to the trial court's *express* unanimity instruction. *Id.* at 1109. Because the instructions in *Davis* (and here) contained no such explicit defect, the court affirmed the defendant's death sentence. *Id.*

Second, even if the instructions here mirrored those in *Brooks*, the Ohio Supreme Court's holding in that case was based on state law—not, as Spisak claims (Br. 23), a *Mills* deficiency. The court in *Brooks* held that *Ohio law* "require[s] the jury to recommend a life sentence even if only one juror finds the death penalty inappropriate." 661 N.E.2d at 1042 (citing Ohio Rev. Code § 2929.03(D)(2)). Then, "consistent with the *policy* behind R.C. 2929.03(D)," the court mandated that Ohio juries receive an explicit "instruction which requires the jury, when it cannot unanimously agree on a death sentence, to move on in their deliberations to a consideration of which life sentence is appropriate." *Id.* (emphasis added). Language was then added to Ohio's pattern jury instructions reflecting the Ohio Supreme Court's interpretation of the state death-penalty statute. See 2 Ohio Jury Instructions: Criminal § 503.011 (2009).

Therefore, even if Spisak could establish that his jury instructions contravened *Brooks*, he has shown nothing more than a violation of state law, which "is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

2. So-called "acquittal first" instructions do not violate *Mills*.

Spisak argues that the trial court gave an unconstitutional "acquittal first" instruction when it told the jury to determine whether the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. Pet. App. 323a-324a. Spisak claims that "a reasonable juror would have understood the[se] instruction[s] to mean that a

death sentence had to be unanimously rejected before a life sentence could be considered"—a potential understanding that he says violates *Mills*. (Br. 24).

Even if Spisak's reading of the instructions is correct, his interpretation of *Mills* stretches that case beyond recognition. The *Mills* Court invalidated a cryptic set of jury instructions and verdict form because "reasonable jurors . . . well may have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." 486 U.S. at 384. Such a unanimity requirement as to mitigating factors, the Court said, could give rise to the perverse outcome of a jury imposing a death sentence even though all twelve jurors found the presence of at least one, albeit different, mitigating factor. *Id.* at 374. The *Mills* Court concluded that such a situation would be intolerable, because each juror "must be permitted to consider all mitigating evidence" when deciding the ultimate question about the appropriateness of the death penalty. *Id.* at 384.

Spisak would dramatically expand that holding. Whereas *Mills* prohibits instructions that "require[] jurors to find mitigating factors unanimously," *Beard*, 542 U.S. at 413, Spisak would prohibit instructions that require jurors to answer the ultimate question—life or death—unanimously. He claims that such directives "preclude each individual juror from individually giving effect to the mitigating evidence." (Br. 24). See also *Davis v. Mitchell*, 318 F.3d 682, 689 (6th Cir. 2003) ("Any instruction requiring that a jury must first unanimously reject

the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*."). Rather, Spisak argues, the jury must understand "that one juror's vote against the death penalty would prevent a death sentence." (Br. 25). And if such a vote occurs in deliberations, the jury should move to a discussion of life sentences. (Br. 21, 22, 24, 32).

This Court has already made clear, however, that a State may instruct the jury to reach consensus on the ultimate question—whether the aggravating circumstances outweigh the mitigating factors. In *Jones v. United States*, 527 U.S. 373 (1999), a capital defendant argued that "the Eighth Amendment requires that the jury be instructed as to the effect of their inability to agree" on the death penalty. *Id.* at 380. The defendant asked the trial court to give the following instruction: "'In the event . . . the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment . . . .'" *Id.* at 379.

This Court refused, holding that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." *Id.* at 381. Rather, the Court noted, "'the very object of the jury system is to secure *unanimity* by a comparison of views.'" *Id.* at 382 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)) (emphasis added). *Jones* therefore forecloses Spisak's argument that his jury instructions violated the Eighth Amendment by "command[ing] that the jury

unanimously reject the death penalty before considering a life sentence." (Br. 21).

Spisak's argument further rests on a flawed hypothetical. He contends that, under the jury instructions, "one juror voting for a death sentence would prevent the remaining eleven jurors from voting for a life sentence because only after unanimously rejecting death could the jury consider life." (Br. 17). But there is no constitutional defect in such an outcome. All twelve jurors are allowed to consider and give effect to the mitigating evidence. The one dissenting juror in the hypothetical does not "prevent the remaining eleven jurors from giving effect to the mitigating evidence" (Br. 32); his vote simply results in a jury deadlock on the ultimate question.

Put simply, *Mills* protects the right of each individual juror to identify and weigh a relevant mitigating factor even if other jurors have rejected that same factor. See James S. Liebman, *Slow Dancing With Death*, 107 Colum. L. Rev. 1, 65 (2007) ("Each juror must make his or her own independent judgment about the presence and weight of mitigating factors."). It does not prohibit the State from asking the jury, as a collective body, to "express the conscience of the community on the ultimate question of life or death." *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (citation omitted). Nor does it require the State to inform the jury "as to the consequences of a breakdown in the deliberative process" on that question. *Jones*, 527 U.S. at 382.

3. Even if "acquittal-first" instructions are unconstitutional, AEDPA bars relief.

Even if Spisak could demonstrate that "acquittal first" jury instructions are unconstitutional under *Mills*, he cannot demonstrate a violation of "clearly established law" under AEDPA. See *Musladin*, 549 U.S. at 74 ("'[C]learly established Federal law' in § 2254(d)(1) 'refers to the holdings . . . of this Court's decisions as of the time of relevant state-court decision.'" (citation omitted)).

First, *Mills* was not clearly established law at the time of Spisak's conviction. As this Court has noted, "it is arguable that the '*Mills* rule' did not fully emerge until the Court issued *McKoy v. North Carolina*, 494 U.S. 433 (1990)." *Banks*, 542 U.S. at 413 n.4. And *McKoy* was issued two years after the Ohio Supreme Court's decision affirming Spisak's conviction and sentence.

Second, even if *Mills* was clearly established law at the time, the Ohio Supreme Court's rejection of Spisak's jury instruction claim was not contrary to or an unreasonable application of that decision. Notwithstanding Spisak's protestations (Br. 25-28), the Warden is not invoking AEDPA to defeat application of *Mills* to a similar fact pattern. See *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring in judgment). ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."). To the contrary, the Warden's merit brief cited a litany of circuit court opinions, including a Sixth Circuit opinion, that applied *Mills* and approved jury

instructions similar to those at issue here. (Br. 24-25). Spisak did not cite a single decision going the other way. Given the many courts that have agreed with the Warden's position, either Spisak's expansive interpretation of *Mills* is wrong or it is not clearly established law.

Third, no support exists for Spisak's assertion that *Mills* clearly established the "acquittal first" doctrine. (Br. 31). No other circuit has adopted the Sixth Circuit's analysis, nor has the term emerged in any recognized treatise or law review article on penalty-phase procedures. Moreover, the Sixth Circuit recently rejected a claim by a capital habeas petitioner that his appellate counsel was ineffective for failing to raise an "acquittal first" jury instruction claim on direct appeal in the mid-1990s. See *Davie v. Mitchell*, 547 F.3d 297, 313 (6th Cir. 2008). The court observed that the circuit first adopted its "acquittal first" rule in 2003. *Id.* at 314 (citing *Davis*, 318 F.3d at 682). The *Davie* court then cited to earlier cases from the Ohio courts and the circuit itself approving jury instructions that were almost identical to those before it. *Id.* at 315-16 (citing *Davis*, 666 N.E.2d at 1109; *Henderson v. Collins*, 262 F.3d 615, 622 (6th Cir. 2001)). And those instructions are almost identical to the set used at Spisak's trial. See *id.* at 313. If an appellate attorney was not at fault in the mid-1990s for failing to predict the Sixth Circuit's subsequent creation of the "acquittal first" doctrine, then the Ohio Supreme Court also acted reasonably in 1988 when it failed to recognize the doctrine.

Thus, by the Sixth Circuit's own acknowledgement, the "acquittal first" rule was not clearly established law in 1988, and, therefore, AEDPA bars relief on that theory.

B. The Ohio Supreme Court's denial of Spisak's ineffective assistance claim was not contrary to or an unreasonable application of *Strickland v. Washington*.

1. The Sixth Circuit failed to conduct the proper *Strickland* inquiry.

On his ineffective-assistance claim, Spisak initially accuses the Warden of straying beyond the boundaries of the Petition. He argues that the sole concern of the second question presented is whether *United States v. Cronic*, 466 U.S. 648 (1984), or *Strickland v. Washington*, 466 U.S. 668 (1984), applies to his case. (Br. 32). And because the Sixth Circuit cited *Strickland*—which both parties agree applies—Spisak urges the Court to affirm the judgment below. (Br. 37).

The Warden's Petition, however, squarely asked whether the Sixth Circuit applied the correct analysis to Spisak's ineffective-assistance claim, and the Warden consistently has maintained that the circuit failed to conduct a *Strickland* prejudice inquiry. The Sixth Circuit referenced "prejudice" at just one point in its opinion: "Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death." Pet. App. 67a. There is

no indication that the court, as a proper *Strickland* analysis would require, "reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The appeals court's silence shows that it presumed prejudice.

Spisak emphasizes that the Sixth Circuit's opinion cited *Strickland*, not *Cronic*, (Br. 33, 36, 37), and he asserts that "[w]hen a court cites the correct legal standard it is presumed that the court actually applied that standard." (Br. 34). And he casts the Sixth Circuit's repeated invocation of *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), an earlier circuit decision applying *Cronic*, as limited to the panel's deficient-performance finding. (Br. 35).

The Sixth Circuit's passing incantation of *Strickland*, however, does not substitute for actual analysis, and Spisak identifies no point in the Sixth Circuit's opinion where such an analysis occurred *because it never happened*. The Sixth Circuit did not identify the nature and weight of the aggravating circumstances in this case. Nor did it articulate the mitigating factors that had been established at trial, and how they should be balanced against the aggravating circumstances. This Court therefore should not presume, as Spisak urges, that the Sixth Circuit conducted a prejudice inquiry simply because it cited *Strickland*.

2. AEDPA deference applies to the Ohio Supreme Court's decision on direct review.

Spisak raised his ineffective assistance claim as one of 64 propositions in a 497-page merit brief to the Ohio Supreme Court, and the court summarily rejected it on the merits. Pet. App. 306a-307a. Spisak now asserts that the court's "cursory and unexplained treatment of th[e] claim" entitles him to *de novo* federal habeas review (Br. 42), because AEDPA deference applies only to state court opinions that contain "the complexity and multi-level analysis necessary to review an ineffective assistance of counsel claim." (Br. 41-42). But this argument has no merit.

AEDPA applies "to *any* claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d) (emphasis added), and this Court has straightforwardly applied that command. In *Weeks v. Angelone*, 528 U.S. 225, 231 (2000), the state supreme court summarily denied the petitioner's jury instruction claim on the merits. This Court nevertheless applied AEDPA and deferred to the state court's reasonable analysis of the law. *Id.* at 237.

The federal appellate courts likewise have rejected arguments that summary denials receive no deference under AEDPA. A summary denial is still a "state court decision on the merits of a federal constitutional claim" and, therefore, "an 'adjudication' of the claim for purposes of § 2254(d)." *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (en banc). In such cases, the habeas court applies

AEDPA's deferential standards but "focus[es] on the *result* of the state court's decision." *Harris v. Stovall*, 212 F.3d 940, 943 n.1 (6th Cir. 2000); accord *Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008); *Weaver v. Bowersox*, 438 F.3d 832, 839 (8th Cir. 2006); *Murth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005); *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 310-12 (2d Cir. 2001); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999).

3. Spisak cannot demonstrate deficient performance in this unusual case.

Spisak acknowledges that counsel had "an admittedly difficult case in closing argument," (Br. 43), but his analysis completely ignores that reality. This was not a run-of-the-mill capital murder trial. Spisak's counsel faced a next-to-impossible task when his client expressed pride in how he executed his victims, antagonized the jury with his racist views, insisted that he would continue to kill if given the chance, groomed himself to look like Adolf Hitler, and performed a Nazi salute before the jury. The customary rules of trial advocacy do not have the same currency in such extraordinary circumstances. And the *Strickland* analysis, of course, "judge[s] the reasonableness of counsel's challenged conduct *on the facts of the particular case*, viewed as of the time of counsel's conduct." 466 U.S. at 690 (emphasis added).

Spisak raises four main objections. First, he criticizes counsel for recounting the gruesome circumstances of each murder. He asserts that,

under Ohio law, "[t]he nature and circumstances of the killings themselves may not be considered as aggravating circumstances," and that counsel's statements therefore improperly invited the jury to consider "inflammatory non-statutory aggravating factors." (Br. 53). But Spisak is simply wrong about Ohio law. The jury in this case found that Spisak's offense "was part of a course of conduct involving the purposeful killing of . . . two or more persons." Ohio Rev. Code § 2929.04(A)(5). It would therefore weigh that "course of conduct" as an aggravating circumstance—specifically, that Spisak targeted his five victims as part of his effort "to inflict the maximum amount of damage and casualties on the enemies." J.A. 147. Furthermore, the Ohio Supreme Court has flatly stated that "the sentencer 'may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.'" *State v. Hancock*, 840 N.E.2d 1032, 1054 (Ohio 2006) (citing *State v. Stumpf*, 512 N.E.2d 598, 602 (Ohio 1987)). Thus, because the jury would in any event have considered the indisputably heinous nature of Spisak's crimes, it was not unreasonable for trial counsel to acknowledge the circumstances of the offenses.

Amici similarly complain that "counsel's lengthy and detailed focus" on Spisak's crimes "far exceeded an exercise in gaining credibility," and that counsel should not have made the circumstances of the murders "the central point" of his presentation. (Br. 12-13). But amici fail to acknowledge that it was Spisak, not his lawyer, who made these facts the "central point" of the case. Far from expressing

remorse for, or even indifference toward, his victims' suffering, Spisak celebrated it. His murder of Reverend Rickerson was, in Spisak's words, "pretty nice" and "pretty slick," J.A. 323, and he commemorated it with "a small party at [his] house," J.A. 99. Spisak felt "[p]retty good" about hunting down and shooting John Hardaway on a transit platform, marking it with "a pizza and a couple of Cokes." J.A. 119-20. His murder of Brian Warford in a public bus stop "was so perfect" because he went "unseen and unheard," J.A. 172, and he bragged that he shot Timothy Sheehan "right between his eyes" in a campus restroom, J.A. 194.

Amici's statement that counsel should have been "as brief as possible" with these "potential problems" is unpersuasive. (Br. 13). Given the candor and revelry with which Spisak embraced his victims' deaths, his counsel likely would have engendered the jurors' skepticism if he tried to sweep these unforgettable facts under the carpet. Instead, counsel reasonably attempted to gain credibility by confronting the depravity of Spisak's crimes head on.

Second, Spisak and his amici condemn counsel's decision to malign Spisak's associations with Hitler and Nazism. There was "no justification," amici argue, for "relating the commission of [Spisak's] crimes to Nazi Germany" at summation. (Br. 26). But this position, too, disregards the trial's indelible moments. Spisak boasted that his crimes were motivated by his desire to advance the goals of Hitler. See, e.g., J.A. 93 ("I would give my life for the survival of my people and my race."); J.A. 144 ("I am fighting against the forces of darkness which are

represented by . . . the Jews and Satan creation which is the dark races."). And if jurors needed a reminder at closing argument, Spisak sat in the courtroom sporting a thin, Hitler-style mustache. J.A. 289, 391, 437. Given that Spisak's neo-Nazi allegiances were the elephant in the room, his counsel had no choice but to acknowledge those beliefs and condemn them for what they are—"sick," "distorted," and "twisted." Pet. App. 337a.

Third, Spisak attacks counsel for failing to "humaniz[e]" his client and "assert the many mitigating factors that were present." (Br. 55-56). But Spisak does not identify what positive traits or anecdotes counsel could have presented. The records in defense counsel's possession revealed that Spisak had a normal childhood, J.A. 663-67, and an average I.Q. of 94, J.A. 680. Spisak was married at one point with a child, but he often physically abused his wife (because "'it seemed like she wanted to get beat up'") and once shot her in the stomach with a BB gun. J.A. 660. Spisak regularly smoked marijuana, J.A. 671-72, and collected Nazi memorabilia, J.A. 686. At time of his arrest, he was unemployed and living alone. J.A. 660.

Spisak similarly overstates the inadequacy of counsel's description of his mental illnesses. To be sure, counsel might have offered more detailed descriptions of the expert testimony on Spisak's mental disorders, but it is not clear than those details would have *helped* a plea for leniency. Spisak's lead expert, Dr. McPherson, offered the most detailed testimony on Spisak's psychological profile. She said that, due to his personality

disorder, Spisak had "no emotional response" to his murders. J.A. 468. His gender identity disorder has a "sexualized component" whereby Spisak "gets rather excited with the idea of killing" due to his "out of control" sexuality. J.A. 472. Dr. McPherson also concluded that Spisak's hatred of blacks was "a sexualized kind of thing," and "a power thing," J.A. 474, and that his affiliation with Hitler was a vehicle for him to control his "very disturbing and troublesome" impulses, J.A. 480. Dr. McPherson next testified that Spisak's psychological profile was elevated due to possible malingering, J.A. 482, and marijuana use, J.A. 484. She found that Spisak's long-term outlook was "very poor," J.A. 475, and emphasized that Spisak was "capable of doing very, very bad things," J.A. 484.

This testimony shows why it might have been unwise for counsel to present, as Spisak argues, a detailed "explanation of the nature of [his] significant mental illnesses" and how "those illnesses related to . . . the crimes" at closing argument. (Br. 57). The testimony would not, as amici suggest, have evoked feelings of "compassion due to Spisak's mental illness." (Br. 16). Counsel therefore had to walk a fine line, presenting enough detail in summation for the jury to identify mental illness as a mitigating factor, but not so much that the jury recalled the disturbing aspects of the experts' testimony. Counsel might have failed to thread this needle, but it was not unreasonable to try.

Fourth, Spisak argues that counsel was ineffective because he failed to "request a life sentence." (Br. 52). Amici likewise contend that

counsel "let[] jurors off the hook" by saying he would be proud of them no matter the verdict, thereby "ignor[ing] the well-accepted tenant of trial advocacy that the advocate should ask the jurors for something specific." (Br. 23). But Spisak and his amici disregard case law that says the opposite.

Federal courts have refused to find constitutional ineffectiveness when defense counsel's closing statement candidly acknowledges that jurors could vote either way. The Fifth Circuit has recognized that "counsel . . . may even concede that the jury would be justified in imposing the death penalty." *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997); see also *Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2003) ("'I'm not asking you to look at mitigation. It's not—not there. Wouldn't lie to you'"). The Fourth Circuit has sustained the constitutionality of a similar summation. *United States v. Jackson*, 327 F.3d 273, 299 (4th Cir. 2003) ("[H]is lawyer conceded during closing argument that 'justice in this case says death.'").

At closing argument, counsel stressed the one theme he had left—mental illness. To be clear, the Warden does not in the least suggest, as amici fear, that counsel's effort should be a lesson for "generations of future lawyers . . . about how to present a case." (Br. 3). The summation was confusing and disjointed, and it obviously failed to persuade. But these problems are attributable less to counsel's own failings and more to the fact that Spisak himself undercut all possible mitigation

themes from the stand.[1] Under the peculiar facts of this case, counsel's summation did not transform the trial into "a[n] [un]reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

4. Spisak cannot demonstrate prejudice.

Even if counsel's performance was deficient, it was not prejudicial. *Strickland*'s prejudice inquiry asks "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. And nothing counsel could have done would have altered that ultimate balance.

The record offered Spisak's counsel no recourse to the traditional mitigation themes. As discussed above, there is no evidence of a traumatic upbringing, childhood abuse, or neglect, for Spisak testified that his parents properly cared for him. J.A. 252-53. Nor is there evidence of a positive relationship between Spisak and his parents, siblings, ex-wife, or daughter. On the contrary, Spisak beat his wife. J.A. 660-68. And at the time of his arrest, Spisak was unemployed, living alone, and using marijuana. J.A. 660-61.

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[1] It is worth noting that counsel had considerable trial experience in criminal cases, specifically capital cases. See James F. McCarty, *Defense Lawyer Thomas M. Shaughnessy, 63, Dies*, Cleveland Plain Dealer, Nov. 25, 1997, at 1A. See generally *Cronic*, 466 U.S. at 665 ("The character of a particular lawyer's experience may shed light in an evaluation of his actual performance.").

The record likewise offered counsel little basis at closing argument for allaying the jury's natural fears about Spisak's future dangerousness. The defendant's "future dangerousness is on the minds of most capital jurors, and is thus at issue in virtually all capital trials, whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11 cmt. (rev. ed. 2003) (internal quotation marks omitted), *reprinted in* 31 Hofstra L. Rev. 913, 1062 (2003). The jurors would have to choose between a death sentence and two different life sentences with the possibility of parole, Pet. App. 324a-325a, and Spisak's behavior gave them cause for particular concern. While in custody awaiting trial, Spisak fought with two black inmates over playing cards. J.A. 368. He later penned a hate-filled letter to a friend about the incident, lamenting, "'I wish I had a human submachine gun right now so I could exterminate every single one of those kinky-haired mother-fuckers in this jail just like Hitler's Nazi SS soldiers did to all those poor Jews in World War II.'" J.A. 372. He promised to "'slay these vile, filthy, foul-mouthed Pagan, Devil-worshipping illegitimate black bastard sons of Satan.'" J.A. 374. Any juror hearing that pledge would reasonably think that Spisak was a risk for further acts of violence.

Rather, Spisak confines his prejudice argument to one point. He contends that counsel should have "explain[ed] the nature of the mental illness" and "their direct relationship to the crimes and Spisak's beliefs," and then "advocate[d] directly for a life

sentence." (Br. 64). But Spisak's experts offered detailed testimony about his schizotypal personality, borderline personality, and gender identity disorders. Spisak cannot show a reasonable likelihood that, had counsel reiterated those details at closing argument, the jury would have returned a life sentence.

The fact that a defendant has a personality disorder is not, in and of itself, a strong mitigating factor under Ohio law. For one thing, the Ohio Supreme Court has explained that "[p]ersonality disorders are often accorded little weight because they are so common in murder cases." *State v. Wilson*, 659 N.E.2d 292, 310 (Ohio 1996); accord *State v. Taylor*, 676 N.E.2d 82, 98 (Ohio 1997) ("As to the R.C. 2929.04(B)(7) 'other factors,' this court normally has accorded little weight to 'personality disorders' as a mitigating 'other factor.'"). In fact, Spisak's own experts contributed to the dilution of his mental-disorder evidence by observing that "a high proportion" of prisoners—and perhaps every Ku Klux Klan member—have personality disorders. See Trial Tr. at 2490, 2761 (6th Cir. J.A. 2663, 2934).

Such evidence carries substantial weight in mitigation only if the defendant establishes a certain connection between his condition and the crime. Under the statute, he must show that "a mental disease or defect" caused him to "lack[] substantial capacity to appreciate the criminality of his conduct or to confirm his conduct to the requirements of the law." Ohio Rev. Code § 2929.04(B)(3). Or, stated more generally, the defendant must show that his disorder was "so severe as to inhibit [his] ability to

control his actions." *State v. Hoffner*, 811 N.E.2d 48, 66 (Ohio 2004).

On this score, Spisak's evidence was weak. All three defense experts stated that Spisak knew that his actions were criminal. See, e.g., J.A. 593 (Markey) ("[H]e knew that what he was doing was against the law."); J.A. 704 (McPherson) ("[H]e showed a capacity to identify his situation, understand it and his prospects."); J.A. 719 (Bertschinger) ("[H]e knew the wrongfulness of his acts and had the ability to refrain from the acts."). And although these experts also concluded that Spisak had difficulty controlling his aggressive impulses to kill, the trial testimony demonstrated otherwise. For instance, Spisak described an occasion where he refrained from shooting a black man:

> Q: If you hadn't seen the police car, you would have gone out there and shot him?
>
> A: No doubt about it.
>
> Q. That's why you didn't do it, the police were there?
>
> A: That would be kind of stupid to do with the police there.

J.A. 350. This exchange establishes Spisak's ability to control his impulses—or, in the words of the statute, to "conform his conduct to the requirements of law."

Moreover, Spisak fails to recognize that a detailed discussion of his psychological profile at

closing could have been damaging. As discussed above, the experts painted a grim portrait. Dr. McPherson called Spisak "pathological," said he had a fetish for killing, and reported that he was "capable of doing very, very bad things." J.A. 472, 484. Dr. Bertschinger indicated that, if given the chance, Spisak would likely kill again. J.A. 546. Dr. Markey testified that Spisak "had views of his own of the law . . . in which he could indict, convict, and execute the enemy." J.A. 596. All three expressed pessimism that these views or behaviors would change with treatment or time. J.A. 475, 546, 605. It is unlikely that the jurors would have shown greater sympathy for Spisak if only they had been reminded of this testimony.

Finally, no matter what defense counsel argued in summation, the State would get the last word. And during that presentation, the State could "legitimately refer to the nature and circumstances of [Spisak's] offense[s] . . . to explain why the specified aggravating circumstances outweigh[ed] mitigating factors" in the case. *State v. Frazier*, 873 N.E.2d 1263, 1294 (Ohio 2007).

For all the faults that Spisak finds in his counsel's summation, he nowhere articulates an alternative closing argument that would have been more effective. Given the heinous nature of the murders, Spisak's unforgettable trial testimony and conduct, and his stated desire to commit future crimes, there is not a reasonable probability that a different closing argument would have yielded a different result in this case.

CONCLUSION

The Court should reverse the Sixth Circuit's grant of the habeas writ.

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AMICUS CURIAE BRIEF

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(5)

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No. 08-724

IN THE
Supreme Court of the United States

KEITH SMITH, WARDEN,
Petitioner

v.

FRANK G. SPISAK, JR.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF PENNSYLVANIA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, IDAHO, ILLINOIS, KANSAS, KENTUCKY, MONTANA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and *Carey v. Musladin*, 127 S.Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing arguments instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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INTEREST OF *AMICI CURIAE*

Amici, the Commonwealth of Pennsylvania and 18 other States, are vitally interested in the proper construction and application of the standard for habeas corpus relief prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which gives practical effect to principles of federal-state comity, and permits habeas relief only where a state court's ruling is contrary to, or an unreasonable application of, extant clearly-established controlling precedent of this Court. 28 U.S.C. § 2254(d)(1). Rigorous enforcement of AEDPA's deferential standard is important to the *amici* States because it promotes finality and the preservation of properly-rendered state court adjudications as well as other interests important to one of their most basic responsibilities: the administration of criminal justice.

Where, as here, AEDPA's standard is not given its rightful effect, either because there has been an incorrect assessment of this Court's controlling precedent at the time of the state court ruling, or because, contrary to this Court's teachings, the reviewing federal court has chosen to substitute its evaluation of the factual record for that of the state court, the States are adversely affected by the unjustified realignment of the state-federal relationship AEDPA ordains. Whenever relief is granted because of erroneous habeas review, the States are burdened with the unnecessary obligation to retry cases, either in whole or in part, which unduly taxes already-strained public resources. As in this case, where the state court criminal trial took

place decades earlier, this burden is especially acute, because a State's presentation of its case is often hampered by the passage of time. Witnesses become unavailable due to death or incapacity, and those who do testify find that their memories have dimmed. It also means that, for no legitimate reason, victims, or their surviving family members, are forced to endure the anguish associated with a retrial or new sentencing proceeding. There is no finality, legally or practically speaking.

Incorrect habeas review also undermines the efforts of the many state jurists who take seriously the responsibilities they share with their federal colleagues to interpret the Constitution and to safeguard the rights of citizens. *Miller v. Fenton*, 474 U.S. 104, 111 (1985)(noting the "coequal" authority of the state courts to interpret the Constitution). The States have an interest in avoiding these unacceptable consequences of an improper application of the AEDPA standard.

Finally, those *amici* States whose laws provide for capital punishment have an enhanced interest in the proper disposition of the jury instruction claim. This Court's ruling in *Mills v. Maryland*, 486 U.S. 367 (1988), has been understood to prohibit those States from instructing a sentencing jury that it must be unanimous in the determination of mitigating factors, or using a verdict slip reflecting such a requirement. In the two decades since *Mills*, the States have established procedural rules based on that understanding. Approval of the Sixth Circuit's more expansive interpretation of the rule of *Mills* will likely raise questions about the continuing validity of the States' procedures and create confusion about what

revisions might be required, which will interfere with the smooth functioning of their criminal justice systems.

SUMMARY OF ARGUMENT

This Court should reverse the Sixth Circuit's misapplication of AEDPA in reviewing jury instruction and ineffectiveness claims.

In deeming the state court's decision contrary to what was "clearly established" in *Mills v. Maryland*, the court of appeals applied a rule that is not there.

Mills' holding was narrow: do not require juror unanimity to find mitigation. Many federal appellate courts have interpreted what *Mills* established in this very way. But the court of appeals here was not concerned with that narrow rule. It decided that the instructions in this case violated *Mills* because they did not affirmatively tell jurors that they *need not be* unanimous to find mitigation; and because they included a supposed "acquittal first" instruction (*i.e.*, jurors must "acquit" the defendant of death before imposing life imprisonment). *Mills* did not address either question.

The state court's decision rejecting Spisak's jury instruction claim was fully consistent with the holding in *Mills*. By faulting the state court for not finding in *Mills* more than was there, the Sixth Circuit turned AEDPA on its head.

The circuit court likewise erred in applying *United States v. Cronic* to a garden-variety ineffectiveness claim. There is no presumption of prejudice for an inadequate closing argument. Habeas relief was unwarranted.

ARGUMENT

I. The State Court's Decision Is Entirely Consistent with *Mills*.

A. The circuit court expanded *Mills* to find non-existent requirements.

Federal habeas relief "shall not be granted" under §2254(d)(1) unless the state court ruled contrary to, or unreasonably applied, "clearly established Federal law as determined by the Supreme Court of the United States." The words "clearly established" refer "to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)(citation omitted).

The "clearly established" limitation looks to the law as it stood at the time the state court ruled. If this Court's jurisprudence as it existed at the time of the state court's ruling provided no "clear answer" to the legal question involved, the ruling must stand. State court criminal convictions, vetted by rounds of state appellate proceedings, are not to be cast aside because lower federal courts later expanded upon rulings of this Court in unexpected ways.

In three recent cases, *Carey v. Musladin*, 549 U.S. 70 (2006); *Schriro v. Landrigan*, 550 U.S. 465 (2007); and *Wright v. Van Patten*, 128 S.Ct. 743 (2008)(per curiam), this Court had occasion to supply concrete examples of the "clearly established" requirement.

The facts of these cases vary,[1] but in each the Court followed the same legal analysis under AEDPA. First, it identified its decisions that dealt in some way with the legal right asserted by the defendant. Next, it considered the precise issue addressed and what those decisions had specifically held. *See Carey*, 549 U.S. at 74-75; *Schriro*, 550 U.S. at 477-478; *Van Patten*, 128 S.Ct. at 746-747. It then looked to see if these sources furnished a "clear answer to the question presented." *See, e.g., Van Patten*, 128 S.Ct. at 747. Where no clear answer was provided, the Court concluded that there was no basis for declaring the state court decision an unreasonable application of "clearly established Federal Law" under 28 U.S.C. § 2254(d)(1).

Here, although the court of appeals described the governing standard, it failed to follow that standard. It noted *Mills v. Maryland* 486 U.S. 367 (1988), as the controlling case, but expanded upon it, creating new obligations not mentioned there. *Mills* did not consider, let alone resolve, the question of whether the Eighth Amendment requires a court to affirmatively instruct jurors that they need not unanimously agree on mitigating factors. Nor did *Mills* speak to so-called "acquittal first" instructions, *i.e.*, requiring jurors to "acquit" a defendant of the death penalty before life imprisonment be imposed.

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[1] *Carey* dealt with whether there was prejudice to a defendant where courtroom spectators wore buttons bearing the murder victim's picture. *Schriro* asked whether counsel was ineffective when he obeyed his client's order not to present mitigating evidence during capital sentencing. *Van Patten* involved whether an attorney's participation in a plea hearing by speakerphone required a review under the *Cronic* standard for complete denial of the right to counsel.

Rather, it only resolved that jurors may not be instructed that a mitigating circumstance can be considered only if they unanimously find it. *Mills*, 486 U.S. at 371 (jurors were instructed "to require the imposition of the death sentence if [they] unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance").

Mills did not rule on other issues and therefore "clearly established" no other rules of law. In particular, it provides no comment at all about, let alone an answer to, the question of whether states must affirmatively instruct jurors against unanimity in deciding mitigation, or whether states may not issue an "acquittal first" instruction.

It is troubling that the Sixth Circuit was given the opportunity to correct its error after it had been pointed out by this Court itself, which remanded for further consideration in light of *Carey*, *Schriro* and *Van Patten*. It did not reconsider its assessment of what was "clearly established Federal law" using the approach taken in those cases. *See Spisak v. Hudson*, 512 F.3d 852, 853-854 (6th Cir. 2008) (denying rehearing and rehearing *en banc*).

B. The Sixth Circuit's own precedent, as well as that of other circuits, demonstrates that the state court's decision was reasonable.

Had the Sixth Circuit looked even to its own prior jurisprudence, it would have been confronted with the fact that is it at least *reasonable* to read *Mills* narrowly rather than expansively. Under

AEDPA the question is not whether the state court's decision was *incorrect*. The question is whether it was *unreasonable*. *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam). Because federal appellate courts have repeatedly rejected expansive readings of *Mills* similar to that of the circuit court here, the decision of the state court in this case certainly was, at the very least, reasonable.

For example, in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir.) *cert. denied*, 502 U.S. 902 (1991), the Third Circuit held that instructions which failed to affirmatively provide a non-unanimity instruction did not violate *Mills*. 923 F.2d at 308 ("Neither the court nor the verdict sheet stated that the jury must unanimously find the existence of particular mitigating circumstances . . . *Mills* is clearly distinguishable").[2]

In *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999), the tenth Circuit ruled that "[a] trial court need not . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance"); *accord Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir.), *cert. denied*, 525 U.S.933 (1998) (same). The

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[2] As is well known, the Third Circuit, like the Sixth Circuit, later changed its mind and decided to read *Mills* much more expansively. This is an equivalent violation of AEDPA. A petition for certiorari seeking review of the Third Circuit's latest decision in this vein is currently pending. *Beard v. Abu-Jamal*, No. 08-622, filed Nov. 18, 2008. The same issues involving the deference AEDPA requires were before the Court in *Banks v. Beard*, 542 U.S. 406 (2004), but were not addressed because *Teague v. Lane*, 489 U.S. 288 (1989), barred review of the *Mills* claim.

Fourth and Eighth Circuits similarly have read *Mills* as narrowly. *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997), *cert. denied*, 522 U.S. 1058 (1998) ("Arnold now claims a "substantial possibility" existed that the jury could have thought it must also unanimously agree as to the existence of any mitigating circumstances. Unlike in *McKoy* or *Mills*, however, the jury instructions never required the jury to find any mitigating factor unanimously"); *Smith v. Dixon*, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 841 (1994) (no *Mills* error where the jury was required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you," and the instructions required unanimity as to aggravating circumstances and the outcome of the weighing stage).[3]

But what is most striking about the Sixth Circuit's expansive reading of *Mills* in this case is that it contradicts former decisions of the Sixth Circuit itself. These decisions speak for themselves in

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[3] *Accord Parker v. Norris*, 64 F.3d 1178, 1187 (8th Cir. 1995), *cert. denied*, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors that they could consider non-unanimous mitigating circumstances" did not violate *Mills*); *Griffin v. Delo* 33 F.3d 895, 905-906 (8th Cir. 1994), *cert. denied*, 514 U.S. 1119 (1995) (instruction that jurors must impose life if they unanimously found that any mitigating circumstances outweighed aggravating circumstances did not imply that they must be unanimous to find mitigating circumstances); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 471 U.S. 1120 (1994) (*Mills* not violated where jurors told to "find unanimously" whether aggravating circumstances outweigh mitigating ones; "such an instruction does not run afoul of *Mills/McKoy* because it does not state that jurors must agree unanimously on the existence of a mitigating factor") (citation and internal quotation marks omitted).

testifying to the irrefutable reasonableness of the state court decision in this case. *Henley v. Bell*, 487 F.3d 379, 391 (6th Cir. 2007) ("the plain language of both the instructions and the verdict form require unanimity as to the weighing of aggravating and mitigating circumstances -- not the existence of a mitigating circumstance"); *Scott v. Mitchell*, 209 F.3d 854, 874 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000) (no *Mills* issue where jurors told "all 12 of you must sign [the verdict form] . . . [i]t must be unanimous"); *Abdur'rahman v. Bell*, 226 F.3d 696, 712 (6th Cir. 2000), *cert. denied*, 534 U.S. 970 (2001) (rejecting claim that *Mills* required relief because the proximity of the terms "unanimous" and "mitigating circumstances" implied that mitigating circumstances must be found unanimously); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991) (while jurors were told that unanimity was necessary to find an aggravating circumstance, "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement").

C. There are continuing problems with the proper interpretation of what constitutes "clearly established" federal law.

For the *amici* States, such an improper application of AEDPA imposes burdens they should not have to bear. The public resources required to mount a retrial or new sentencing proceeding are needed elsewhere. Victims or their surviving family members should not be distressed needlessly. Defendants whose cases have been conducted in conformity with the Constitution should not be given

a "do-over;" they have had their proverbial "day in court." The decisions of state jurists who have faithfully discharged their obligations to interpret and apply the Constitution should not be disregarded or discarded, especially not based on a fanciful view of the contours of this Court's rulings. Only rigorous enforcement of AEDPA's provisions can avoid these unpalatable consequences and restore the state-federal balance that that AEDPA is intended to achieve.

The Sixth Circuit's failure to give § 2254(d)(1)'s "clearly established" requirement its proper effect in this case is, by no means, a singular aberration. Though it is now over thirteen years since AEDPA went into effect, the requirement still has not been fully assimilated and some courts persist in interpreting the statute in ways that discern constitutional requirements that did not exist at the time of a state court decision under review. Cases like *Carey*, *Schriro* and *Van Patten* show that lower federal courts are wont to stray from the seemingly uncomplicated task of the ascertaining whether this Court's rulings *circa* the date of the state court's decision provided a clear answer with respect to the issue that the state court had to resolve. Instead, they have sometimes extrapolated from or amplified the Court's actual holdings, and then have faulted the state courts for not traveling down the same road.

The Sixth Circuit is not alone in incorrectly assessing what legal rule *Mills* clearly established. In *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), the Third Circuit likewise read more into *Mills*. Though the jury in *Abu-Jamal* was never instructed that mitigating circumstances had to be found

unanimously, nor given a verdict slip that so restricted their deliberations, the court of appeals held that habeas relief was warranted. The Third Circuit explained that, because of the presence of the word "unanimity," (which was used in connection with the determination of aggravating circumstances), "in close relation to . . . [the trial court's] discussion of mitigating circumstances," the jury instructions in the penalty phase had caused it to have an "impression" that there was a "risk of confusion." *Id.* at 520 F.3d 303. It found the state court's decision to be an unreasonable application of *Mills* for not intuiting this and upheld issuance of the writ. The Third Circuit which, like the court of appeals here, had the benefit of the Court's decisions in *Carey*, *Schriro* and *Van Patten*, dodged what, for purposes of AEDPA, is the essential question when it comes to determining what constitutes "clearly established Federal law": Did *Mills* supply a "clear answer" to the question of whether the jury instructions were unconstitutional because they did not include some more explicit discussion on the determination of mitigating circumstances? Decisions like *Abu-Jamal* underscore the need for this Court's clarification that the type of analysis used there, and here, simply does not accord with AEDPA and the purposes for which it was enacted.

D. The improper interpretation of *Mills* potentially raises questions about the validity of the States' jury instructions and procedures in capital cases.

Apart from the practical burdens previously discussed, the incorrect articulation of what legal principle(s) is/are clearly established in *Mills* gives

rise to another potential problem: the continuing validity of state jury instructions and sentencing procedures. As one would expect, this Court's Eighth Amendment jurisprudence informs procedural practices and rules in States whose laws provide for capital punishment, an integral portion of which govern a sentencing jury's consideration and determination of aggravating and mitigating circumstances.

The interpretation given *Mills* by the court of appeals in this case, and that of the Third Circuit in *Abu-Jamal*, if approved, potentially implicate the continuing validity of the States' jury instructions and procedures related to capital sentencing. The notion that *Mills* can continually be mined for new "clearly established" constitutional requirements in the way the courts in these two cases have done, essentially leaves this area of the law unsettled and makes the promulgation of state procedural rules a precarious venture. For this further reason, the *amici* states have an interest is the proper construction of the words "clearly established" and in seeing that they are given their plain meaning.

II. Because The Ohio Supreme Court's Ruling On Spisak's Ineffectiveness Claim Was Not Contrary To, Nor An Unreasonable Application Of *Strickland*, Habeas Relief Should Not Have Been Granted.

The Sixth Circuit's second basis for granting habeas relief is even more indefensible than its first. The court wholly failed to evaluate the state court's decision "through the lens of § 2254(d)(1)." *Price v. Vincent*, 538 U.S. 634, 639 (2003). A federal court

"may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be unreasonable." *Williams*, 529 U.S. at 411. Here, the circuit court's decision is both unreasonable and wrong.

When a criminal defendant contends that his attorney was ineffective in representing him, the controlling case is ordinarily *Strickland v. Washington*, 466 U.S. 668 (1984). *See Van Patten*, 128 S.Ct. at 746; *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). *Strickland* requires a court to determine two things: whether counsel's performance was professionally deficient and whether the defendant was prejudiced by counsel's deficient performance. 466 U.S. at 687. A court may take up these questions in any order, *id.* at 697. Failure to satisfy either element requires rejection of the claim. *Id.* at 687.

The Sixth Circuit, however, did not review the Ohio Supreme Court's decision under *Strickland*, but rather undertook a subjective assessment of defense counsel's closing argument under *United v. Cronic*, 466 U.S. 648 (1984).[4] *Cronic* recognized "a narrow exception" to *Strickland's* two-step "performance and prejudice" analysis. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004). This exception applies only where the circumstances are so fundamentally improper

[4] The court of appeals' discussion of the issue did not cite *Cronic* directly, but referred instead to *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), a Sixth Circuit ruling that employed the *Cronic* analysis.

"that a presumption of prejudice is appropriate without actual inquiry into the conduct of the trial." *Id.* at 659-660. Thus, *Cronic* applies where counsel is totally absent, or is prevented from providing assistance at a critical stage of the proceeding, or where there has been such a breakdown in the adversarial process as to result in a complete—not partial—failure by counsel to test the state's case. *Id.* at 659-697.

Cronic does not apply to this case and it is mystifying that the Sixth Circuit thought it did. The record does not show that that counsel was absent or unable to render assistance at any point. There was no breakdown in the adversarial process. Even if it could be said that counsel did not advance the best case he could for his client—and *amici* do not believe that to be true given the very difficult circumstances of this case—the record indisputably shows that defense counsel devised, and put into effect, a strategy designed to defeat the state's case for a capital penalty. There was no failure to test the state's case, let alone the complete failure *Cronic* requires.

In short, there was no circumstance that could have justified applying *Cronic*. *Strickland* obviously was the controlling precedent for a claim of the sort involved here, that disputes the quality, not the existence, of counsel's assistance.

Under a *Strickland*-based review there is no basis for relief at all, let alone under the stringent AEDPA standard. The Ohio Supreme Court's rejection of Spisak's ineffectiveness claim was neither contrary to, nor an unreasonable application of *Strickland*—to the contrary. *Strickland* instructs that

> [j]udicial scrutiny of counsel's performance must be highly deferential . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689-690. There is no checklist, no "one-size-fits-all" set of rules for measuring counsel's performance. There are a vast number of different approaches that professionally responsible counsel may elect to take in defending an accused. *Id.* at 689-690 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Whether counsel's performance was within the broad spectrum of professionally responsible representation is a case-specific assessment which must take into account the circumstances in which the representation took place as well as the client's statements and instructions.

A state court reviewing counsel's performance as part of an ineffectiveness claim must follow *Strickland*'s directions about how to conduct that review, and these very directions invest the state court

with a great deal of discretion. A federal habeas court reviewing a state court's decision on collateral attack must be all the more mindful of this when evaluating whether the ruling was contrary to or an unreasonable application of *Strickland,* and must take particular care not to improperly disturb the result when the state court has properly discharged its responsibilities thereunder. There must be an appreciation that a state court's exercise of discretion under *Strickland* may lead to outcomes that are valid even if the reviewing court, considering the claim *de novo*, would not have reached the same outcome. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009)(explaining that "doubly differential judicial review" applies to *Strickland* claims evaluated under §2254(d)(1)). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Affording deference to a state court's ruling is especially important in that state courts are co-equal interpreters of the Constitution. There is no reason to think that the state courts take this responsibility less seriously, or that they are less vigilant in protecting the rights of an accused, than a federal court—to the contrary. *See Sawyer v. Smith*, 497 U.S. 227, 241 (1990)("State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.")

Indeed, in the first instance of appellate review in this case, the Ohio Court of Appeals for the Eighth District overturned two of the counts of aggravated murder and vacated one of the two convictions. *See* 465 F.3d 684. The state appellate courts do not rubber-stamp state criminal convictions. *See, e.g., Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008)(finding defense counsel ineffective for failing to adequately investigate evidence of mitigation and remanding for new penalty proceeding); *Commonwealth v. Gorby*, 909 A.2d 775 (Pa. 2006)(same).

Given its fundamentally erroneous application of *Cronic*, the Sixth Circuit never addressed whether the Ohio Supreme Court's decision was contrary to or an unreasonable application of *Strickland*. Given the record, that question can only be answered in the negative. As petitioner's brief sets out in detail, *see* Br. for Petitioner at 31-36, Spisak's attorney faced an extremely difficult situation in the wake of his client's testimony and the absence of evidence of insanity or some other form of mental defect. Despite having little to work with and an unsympathetic client, counsel devised a plausible plan to avoid a death sentence by appealing to the jurors' humanity. In carrying it out, he made tactical judgments, consistent with sound litigation practice, to concede certain points to enhance his credibility in service of his ultimate goal.

The Ohio Supreme Court understood and effectuated *Strickland*'s direction for evaluating attorney performance, and conducted a context-based review which found no basis for relief under either of *Strickland's* prongs. That ruling was consistent with,

not contrary to, *Strickland*. It involved a reasonable application of *Strickland*'s holding. As a result, on habeas review, the state court decision should have been upheld.

By contrast, the Sixth Circuit's examination of this issue, wrongly oriented to *Cronic*, does not take into consideration that sound professional performance must be evaluated contextually; that "Monday morning quarterbacking" is not permitted; and that there is a presumption that counsel was professionally competent. The court of appeals did the very thing that this Court said in *Williams* was prohibited by AEDPA: it substituted its judgment for that of the state court.

Not only was it wrong for the court of appeals to re-evaluate counsel's performance and to use that re-evaluation as the basis for granting relief, but the manner in which it did so cannot be reconciled with the type of scrutiny *Strickland* prescribes. The court of appeals' discussion gives virtually no attention to reconstructing the circumstances that Spisak's counsel faced and reflects little understanding of the actual constraints on counsel's performance or the very few options he had.[5] *See* 465 F.3d at 703-706.

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[5] Not only did counsel have to contend with overwhelming evidence of Spisak's guilt, including his unrepentant confession, but he had to find a way to deal with his client's testimony in the guilt phase which, with its vehement endorsement of Nazism and many racist, anti-Semitic and homophobic remarks, did nothing to make Spisak appear sympathetic. *See* Br. for Petitioner at 31-36. In devising a strategy, counsel, too, had to adhere to his ethical obligations, including that of candor to the tribunal. *See*, e.g., Ohio Rule of Professional Responsibility 3.3.

(*Footnote continued on next page*)

Instead of evaluating the whole of counsel's performance, the court parsed his closing argument and focused on certain statements, which it termed deficient. *Id.* The court appears not to have considered the possibility that, in the larger context, there may have been a valid strategic reason for those statements, but instead simply presumed they were *per se* prejudicial to the defendant.

This is especially troubling when one remembers that the court of appeals based its criticism of counsel's performance strictly on the cold record which did not supply information about the tone or inflection of the comments as they were actually delivered. As the trial practice treatises cited by petitioner point out, *see* Br. for Petitioner at 39-40, the manner in which something is said, can be extremely important. Plainly, by evaluating counsel's argument so narrowly, the court of appeals did not approach its review of the record with the presumption that counsel was competent, as *Strickland* dictates. But even more important, it failed to appreciate that the Ohio Supreme Court's ruling did not apply *Strickland* unreasonably when it did not undertake a similarly narrow critique of counsel's performance.

Issuance of the writ cannot be justified on this basis either.

(*Footnote continued from preceding page*)

The court of appeals' decision does not reflect a true appreciation of the treacherous waters defense counsel had to navigate in this case.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

KEITH SMITH, WARDEN,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF STEVEN LUBET, THOMAS A. MAUET, JAMES W. McELHANEY, JOHN B. MITCHELL, LAURENCE M. ROSE, FAUST F. ROSSI, JACOB A. STEIN, HERBERT J. STERN, AND MICHAEL E. TIGAR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This brief addresses whether the closing argument given by defense counsel in the sentencing phase of Spisak's trial was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici or their counsel has made a monetary contribution to this brief's preparation or submission.

Georgetown Journal of Legal Ethics, the Southern California Law Review, and the American Journal of Criminal Law. Laurence M. Rose is President of the National Institute for Trial Advocacy and Professor Emeritus and Director Emeritus of the Litigation Skills Program at the University of Miami School of Law. Faust F. Rossi is the Samuel S. Liebowitz Professor of Trial Techniques at Cornell Law School. Jacob A. Stein is a trial lawyer, an adjunct professor at the Georgetown University Law Center, and author of Closing Argument: The Art and the Law (originally published 1969 and updated since then by looseleaf supplements). Herbert J. Stern is a trial lawyer, former U.S. Attorney for the District of New Jersey, and former federal judge, having served as United States District Judge for the District of New Jersey from 1974 to 1987. He is the author of several books on the subject of trial advocacy, including Trying Cases to Win: Anatomy of a Trial (1999), co-authored with Stephen E. Saltzburg. Michael E. Tigar is Professor of the Practice of Law at Duke Law School, and has held faculty positions at other universities in the United States and abroad. He is author, among other works, of Examining Witnesses (2d ed. 2003), Persuasion: The Litigator's Art (1999); and Fighting Injustice (2002), and an editor of Trial Stories (M. Tigar & A.J. Davis eds., 2008).

The views expressed in this brief are those of the individual *amici* and do not necessarily reflect the views of the institutions at which they teach or with which they are otherwise affiliated.

This case raises important questions about the advisability of certain techniques for delivering a closing argument in a criminal trial, an issue about which the *amici* have great expertise. Given their

collective knowledge about the subject, *amici* are well situated to assess whether defense counsel's performance was deficient under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

Petitioner cites various trial advocacy treatises, including those written by *amici*, for the proposition that defense counsel's closing argument was the result of a legitimate strategy. In doing so, petitioner overstates and mischaracterizes the literature, to a degree that causes some of the *amici* considerable dismay. The cited treatises actually demonstrate—in accordance with all of the *amici*'s experience and views—that the closing argument in this case was far afield from any sound trial strategy. Thus, *amici* respectfully submit that petitioner's invocation of their teachings is seriously misplaced.

Although there is not a single correct closing statement to be given in any individual case, some basic tenets of trial advocacy are widely accepted. Trial counsel in this case adhered to none of those principles, and violated many. For example, although acknowledgment of weakness in the context of arguing a case's strong points *is* a sound strategy, a closing argument that magnifies and obsesses on weaknesses, while discussing strengths in an indirect and at times incomprehensible manner, is below any reasonable measure of professional competence. For this Court to determine otherwise in this case would teach generations of future lawyers incorrect lessons about how to present a case, and would leave clients—both Mr. Spisak and future clients in like cases—without the reasonable assurance of actual assistance of counsel to which the Sixth Amendment entitles them. Concerned about the effect of this case on both lawyers and clients, *amici* wish to

make their views known and hope that they can assist the Court by doing so.

SUMMARY OF ARGUMENT

In delivering his closing argument, defense counsel defied all recognized strategies of trial advocacy. He dwelled on the central weakness of his own case; the opening act of the argument comprised a discussion of why the defendant was a despicable person undeserving of sympathy. He misstated the statutory aggravating factors that the jury was permitted to consider, drastically overstating the argument in favor of imposing the death penalty. When he was done attacking the defendant, he became inefficient and disorganized. If he was attempting at that point to make an argument in mitigation, it was barely—if at all—recognizable as such.

The only possible strategic reason for this presentation would be to build credibility with the jury so that counsel could then make a strong affirmative presentation that the mitigating factors supported leniency. But defense counsel did not do that. Instead, he stated baldly and repeatedly that his client was undeserving of mitigation, and he concluded with a promise that no one—not even defense counsel—would fault the jury for returning a death sentence.

Amici do not believe there could be a legitimate strategic reason for this penalty-phase closing argument. In their view, the argument was deficient to such a level that it constituted ineffective assistance of counsel.

ARGUMENT

A lawyer who takes on the duty of representing a client charged with a terrible crime faces many difficult challenges. Prominent among them is navigating the inevitable hostility of the jurors—a challenge that defense counsel in this case did not even attempt to take on. Rather, defense counsel seemingly did everything he could to empower the jury to return a death sentence, including presenting a closing argument at sentencing that read like a closing argument given by an overzealous prosecutor.[2]

Among the most basic principles of closing argument are:

- "[A]sk for what you want. * * * [Y]ou will guide the jury through the judge's instructions."

- "The law is something the jurors care about. You must stress the important principles of law that guide decision * * * ."

MICHAEL E. TIGAR, PERSUASION: THE LITIGATOR'S ART Ch. 5, at 151-52 (1999) (focusing on principles of advocacy and on the lessons of Edward Bennett

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[2] *Amici* are unsurprised that the Sixth Circuit commented that the same argument, if made by a prosecutor, "would likely have been grounds for a successful prosecutorial misconduct claim." *Spisak* v. *Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006) (citing *Rickman* v. *Bell*, 131 F.3d 1150, 1160 (6th Cir. 1997)), *vacated*, 128 S. Ct. 373 (2007), *reinstated*, 512 F.3d 852 (2008). See generally JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT §§ 9.14-9.15, 9.19, 9.21 (3d ed. 2003) (typical prosecutorial abuses in a closing argument include "appeals to the * * * prejudices of the jury," "[a]ttacking the defendant—name calling," and "express[ing] his personal opinion as to the * * * guilt of the defendant").

Williams). It is of critical importance to show the jury, in words and actions, why the evidence and law compel respect for the defendant's right to live, or to liberty. TIGAR Ch. 5 at 151-235 (citing examples from lawyer argument in the cases of Terry Nichols, Queen Caroline, and John Connally).

In this case, instead of attempting to convince the jurors that mitigating factors weighed against the imposition of the death penalty, defense counsel homed in on what he called "aggravating factors" and spent the critical first portion of his closing argument graphically describing the "horrendous" nature of Spisak's crimes. Then, rather than attempting to rehabilitate the defendant in the eyes of the jurors, or imploring them to consider Spisak's mental illness as a reason to spare him, defense counsel embarked on a meandering and often-nonsensical discourse, "rambling incoherently towards the end of the closing statement." *Spisak*, 465 F.3d at 704-05. He did not present a case for mitigation, but instead told the jury that his client was undeserving of mitigation—or even sympathy—and that a decision to impose the death penalty would be just as praiseworthy as a decision not to. See Argument p. 49;[3] *Spisak*, 465 F.3d at 705-06.

Petitioner argues that defense counsel's performance was the objectively reasonable result of a sound trial strategy. Pet. Br. 31-40. Characterizing the closing statement (without quoting the actual words), petitioner identifies defense counsel's strategy as one designed to demonstrate his credibility by addressing

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[3] Citations to defense counsel's closing argument are to the original pagination of the trial transcript.

the weaknesses in his own case and to "bolster his own sincerity by criticizing his client's indefensible views." Pet. Br. 37-40. *Amici* respectfully disagree, however, that the closing statement could have been the result of any reasonable strategy.

First, Spisak's counsel's treatment of what he termed "aggravating factors" cannot be considered the result of legitimate tactical decisionmaking. Counsel's discussion went far beyond a dignified acknowledgment of the harsh reality of Spisak's crimes. Pet. Br. 37. The discussion was too prominent, too long, and too aggressive to be considered merely an attempt to gain credibility with the jury. In any case, the general strategy of conceding one's weaknesses cannot bear the weight of defense counsel's closing remarks here. Even a milder and more succinct version could not have been part of a sound strategy to win over the jurors, as defense counsel made virtually no effort to rehabilitate the defendant. Counsel's denigration of his client simply was not offset by an affirmative effort for which credibility would have been helpful. Thus, "trial counsel abandoned the duty of loyalty owed to Defendant," *Spisak*, 465 F.3d at 706 (citing *Rickman*, 131 F.3d 1150), and Spisak effectively was left without the assistance of counsel.

Second, there is no context in which it is a sound strategy to urge the jurors to consider non-enumerated, emotionally charged issues as aggravating factors. Yet defense counsel went well beyond a review of the statutorily permissible aggravating factors to focus the jurors on the nature and circumstances of the crimes, the defendant's extremist political beliefs, and the pain felt by the victims' families. None of these so-called "aggravating factors" was a permissible consideration

under Ohio law, and defense counsel was not raising these arguments anticipatorily, because the prosecution would have been prohibited from making them. Defendant's counsel's gross misstatement of the law in this area, especially to the detriment of his own client, deprived Spisak of the effective assistance of counsel.

Amici respectfully submit that "counsel's performance was deficient," *i.e.*, it "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Thus, the first of two prongs for analysis of ineffective assistance of counsel under *Strickland* v. *Washington* was met.[4] Notwithstanding the "strong presumption" that counsel's decisions were reasonable, *id.* at 689, the errors made by counsel in the present case were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687.[5]

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[4] *Amici* do not address the second prong of the *Strickland* analysis, whether the defendant was prejudiced by counsel's deficient performance, because their expertise lies primarily in judging the competence of the argument, and because they do not have the familiarity with the complete record necessary to make a fully informed assessment of prejudice. *Amici* do commend to the Court respondent's analysis of the second *Strickland* prong (Resp. Br. 60-64), which makes a facially persuasive case that there is a reasonable probability that in the absence of defense counsel's deficient closing—which undoubtedly did much more harm to his client than it did good—at least one juror would have reached a different conclusion about the appropriateness of the death penalty.

[5] Petitioner handpicks select quotations from the closing argument and then—completely ignoring how a jury would interpret this closing argument—concludes that defense counsel's summation was the product of a sound trial strategy. Pet. Br. 31-40. *Amici* disagree strongly with that characterization. Furthermore, even if the "strategy" pulled from petitioner's artificial reading of the

I. Defense Counsel Did Not Have A Sound Strategic Reason For Dwelling On The Details Of The Murders

According to defense counsel, "little really needs to be said about the degree of the aggravating factors, *clearly horrendous*." Argument p. 9 (emphasis added). Yet the first half of defense counsel's closing statement comprised a review, in great and gory detail, of the brutality of Spisak's crimes and the pain felt by the victims and their families. Counsel's unnecessarily vivid and vitriolic descriptions, none of which touched on actual aggravating circumstances, included statements such as the following:

- "[W]e can feel that, or see that cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. *Aggravating circumstances, indeed it is.*" Argument p. 10 (emphasis added).

- "[Y]ou can smell almost the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death." Argument p. 10.

- "And you can feel, you can feel, the loneliness of that railroad platform * * * * and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into

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record were entitled to *Strickland*'s presumption of competence, that presumption is rebutted here, where the "strategy" was implemented in such an extraordinarily poor manner that it actually harmed the client's cause.

the muzzle of a gun that kept spitting out bullets." Argument pp. 10-11.

- "[W]e all know the terror, or we can feel that right in the pit of our stomach. We know how that feels when she ran down the hall first left and then right, and tried to dodge, or did dodge the bullet. But we were there, and we know she feels. And is it an aggravating circumstance, indeed it is." Argument pp. 11-12.

- "[W]e could smell it. And we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they fell [*sic*], because, ladies and gentlemen, we participated, and we were there." Argument p. 12.

- "[Y]ou can see the kid, the kid that was asleep, the kid that never [knew] what hit him, and we can feel that bullet hitting, and *that's an aggravating circumstance.*" Argument p. 12 (emphasis added).

- "[W]e were there so we can remember that hot night, and we could probably smell the stale beer in the car. And we can probably, maybe, smell some marijuana smoke, and we can feel the hatred, and if we listen closely, we probably could hear some jeers, some racial slurs. * * * We were with him when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies

and gentlemen, *would you ever want any more aggravating circumstances*?" Argument p. 13 (emphasis added).

- "There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces." Argument p. 13.

- "Coletta Dartt and John Hardaway. We call them lucky. Lucky, if you have a nightmare that will never go away. That's lucky, it may be, but *it's an aggravating circumstance.*" Argument pp. 13-14 (emphasis added).

As stated by General George C. Marshall, "[r]epeating that we are surrounded does not qualify as a plan of escape." Jacob A. Stein, *A Personal Creed*, WASHINGTON LAWYER (Mar. 2003). This is also true here; harping on the gruesomeness of the crimes does not qualify as a defense. Defense counsel's "rather heav[y]" focus "on what he called the aggravating circumstances and the heinousness of the crimes" constituted ineffective assistance of counsel. *Spisak*, 465 F.3d at 704. Especially in light of defense counsel's complete failure to present mitigating evidence, counsel's tirade about the defendant's "clearly horrendous" behavior cannot have been "an appropriate part of trial counsel's strategy." *Id.* at 704-05.

A. Defense Counsel's Discussion Of Aggravating Factors Was Too Long and Impassioned To Be Legitimately Designed To Gain Credibility

Petitioner argues that "[c]ounsel might reasonably have calculated that it was better to draw the sting out of the prosecution's argument and gain credibility with

the jury by conceding the weaknesses of his own case." Pet. Br. 37. Indeed, petitioner now asserts that, because the "damaging facts were already before the jury," *id.*, counsel's focus on the gruesome details of the murders was a "common" and "advisable" trial tactic, *id.* (citing ROGER HAYDOCK & JOHN SONSTENG, ADVOCACY: OPENING AND CLOSING: HOW TO PRESENT A CASE § 3.51, at 106 (1994); THOMAS A. MAUET, TRIAL TECHNIQUES 413 (5th ed. 1999)). Petitioner's argument ignores the outer limits of this strategy and exaggerates the extent to which it can be detected in defense counsel's closing argument.

It can be a legitimate strategy for counsel to build credibility with the jurors by acknowledging weaknesses in his case.[6] But defense counsel's lengthy and

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[6] Clarence Darrow did so in the case of Ossian Sweet:

> The defense in this case faces and admits facts which are sometimes subject to equivocation and avoidance. We are not ashamed of our clients and will not apologize for them. We are American citizens; you men of the jury are American citizens; they are American citizens. Every juryman said that he conceded equal rights to all Americans. On the basis of the legal rights of the defendants we make our defense. We say this with the full realization of the sacredness of human life and having quite as much sympathy for the bereaved family of the deceased as has the prosecution.

Barbara Bergman, *The Sweet Trials*, in TRIAL STORIES 379 (M. Tigar & A.J. Davis eds., 2008). Darrow's acknowledgment was in the context of dignifying, not deriding, his clients. A look at Darrow's client list shows a life devoted to fulfilling the lawyer's highest duty, and a look at his summations demonstrates that he did not denigrate or belittle his clients, but rather asserted their claims for justice eloquently and emphatically. See ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN THE COURTROOM (Arthur Weinberg ed., 1957).

detailed focus on the nature and circumstances of the crimes far exceeded an exercise in gaining credibility; the "clearly horrendous" nature of the crimes became the centerpiece of an improperly emotional argument.

It is not sound strategy to make discussion of the weaknesses in one's own case the central point of one's argument, and it is not sound strategy to harp on those weaknesses in great and focused detail. Among the most fundamental rules of closing arguments is to "[a]void being an expert on the strength of your opponent's case. If there are weaknesses in your case bolster them, do not celebrate them." JACOB A. STEIN, CLOSING ARGUMENT: THE ART AND THE LAW § 200, at 6. Commentators advise counsel: "adopt a positive attitude about your theory. Concentrate on and emphasize your own case first and then incidentally anticipate and disprove the other side's claims." FRED LANE & SCOTT LANE, LANE GOLDSTEIN TRIAL TECHNIQUE § 23:93 (3d ed. 2008). Treatment of potential problems should be as brief as possible, and should not—under any circumstances—be the focal point of a closing argument. "A significant portion of the closing argument should not be spent defensively responding to the opponent's issues, positions and argument because the advocate may be perceived as not having any substantial positions. Arguments that attack the opponent's case must be balanced with arguments that support the case." HAYDOCK & SONSTENG § 3.53, at 107; see also ALBERT J. MOORE, PAUL BERGMAN & DAVID A. BINDER, TRIAL ADVOCACY: INFERENCES, ARGUMENTS AND TECHNIQUES Ch. 14, at 231 (1996) ("Overuse often makes your closing too long, and detracts from your affirmative arguments by spending too much time discussing the adversary's case."); STEVEN LUBET, MODERN TRIAL ADVOCACY:

ANALYSIS AND PRACTICE Ch. 12, at 469 (2d ed. 1997) ("As with all argument it is more effective to present the positive side of your own case."); THOMAS A. MAUET, TRIAL TECHNIQUES 398 (7th ed. 2007) ("you want to concentrate on your strengths, force your opponent to argue his weaknesses."); PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT § 3.20, at 122 (2d ed. 1999) ("Counsel's closing argument should usually be at least seventy-five percent affirmative, i.e., no more than twenty-five percent refutation and rebuttal. Defense counsel should be especially mindful of not overemphasizing plaintiff counsel's argument.").

To the extent that it is advisable for defense counsel to acknowledge weaknesses during closing argument, such statements should not be included in the introductory remarks or in the first section of a closing statement, which all experts agree should contain the party's strongest arguments. See, *e.g.*, LANE & LANE § 1A:61 ("[I]t is wise to place the strongest arguments at the beginning and end of the presentation, repeating the central theme throughout."); LUBET Ch. 12, at 476 ("it is certain that prime time—the very beginning and the very end of the argument—must be devoted to the most important considerations in the case."); MOORE ET AL. Ch. 14, at 216 ("[Y]ou will usually want to begin with your strongest affirmative arguments"); HERBERT J. STERN & STEPHEN A. SALTZBURG, TRYING CASES TO WIN Ch. 14, at 546 (1999). "The first minute or two of your closing argument should communicate * * * your theme, why the jury should find in your favor, and your enthusiasm about your case." MAUET, at 390 (7th ed. 2007). In other words, the "beginning of the closing argument should have an impact and should be in a dramatic manner calculated to frame the issues that we deem most critical to our case in a way favorable to our

position." Laurence M. Rose, *Closing Arguments: An Exercise in Persuasion*, 11 J. KAN. TRIAL LAW. ASS'N 18 (Nov. 1987). "As a corollary to the 'start and end strong' rule * * * concessions should be 'buried' in the middle of your argument." LUBET Ch. 12, at 480. Yet Spisak's defense counsel spent the opening minutes of his argument (and a substantial amount of time thereafter) focusing on the brutality of the crimes and his disdain for Spisak.

Moreover, defense counsel's review of the crimes went far beyond an acknowledgment of weakness. It was an improperly emotional argument that appealed to the passion and prejudice of the jury. See STEIN § 21, at 74 (a statement "which tends to influence the jury to resolve the issues by an appeal to passion and prejudice is improper"); *id.* § 14, at 38 ("[N]either the prosecutor nor defense counsel should argue so as to inflame the passions or prejudices of the jury."); MARILYN J. BERGER, JOHN B. MITCHELL & RONALD H. CLARK, TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY Ch. XII, at 481 (1989) ("Arguments calculated to inflame the passion, prejudice, or fear of the jurors should be avoided."); LANE & LANE § 23:6 ("Neither may counsel make statements to inflame, prejudice or mislead the jury."); LAGARIAS § 1.19, at 38 (2d ed. 1999) ("Emotional argument directed at inciting passions and prejudices, rather than at reviewing record evidence, is improper.").

Even the precise way in which defense counsel offered the details of the killings—instructing the jurors to put themselves in the place of the victims and the victims' families—was improper. Indeed, it would have been improper even coming from the *prosecutor*. STEIN § 22, at 81 (it is improper for a prosecutor to

"comment that the victim's family would be facing the holiday season one short"); *id.* § 12, at 29 ("It is * * * improper for a prosecutor in a criminal case to deliver a closing argument in the first-person voice of the victim."); cf. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK Ch. 78, at 677 (4th ed. 2005) ("it is forbidden to ask jurors to put themselves in the position of a party").

There simply is no support for the notion that this was a sound trial strategy.

B. Counsel's Discussion Of Aggravating Factors Was Not Offset By A Discussion Of Mitigating Factors

The approach of building credibility with the jurors might have made strategic sense only if, after all of the concession of weakness and emphasis on the despicable nature of the crimes and the defendant, defense counsel argued that the defendant was nonetheless entitled to leniency. It would perhaps be possible to say that these sections of counsel's closing statement were grounded in strategy if defendant's trial counsel had spent his remaining time refuting and rebutting the feelings of hostility that the jurors inevitably harbored towards Spisak after the first portion of the closing. See LAGARIAS § 3.20, at 122 (2d ed. 1999). But defense counsel did not argue to the jurors that their hostility should be replaced by compassion due to Spisak's mental illness, or that the brutal crimes were committed by a misguided, mentally ill defendant who deserved to be spared. And defense counsel did not impress upon the jurors their obligation to give effect to mitigating evidence. See *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). Instead, defendant's counsel

made only a fleeting attempt to argue that Spisak was mentally ill if not legally insane, and then proceeded to undermine even that meager effort by telling the jurors that Spisak warranted neither sympathy nor mitigation.

Petitioner argues that defense counsel should be excused from his complete failure to present mitigating factors because there was "no chance" the jurors "harbored any sympathy for Spisak" anyway. Pet. Br. 39 (citing FRANK M. COFFIN, A LEXICON OF ORAL ADVOCACY 29 (1984)). Petitioner understates the gravity of this deficiency and cites Judge Coffin selectively and out of context. Although defense counsel was not obligated to try to paint a picture of Spisak as a model citizen, minimum professional competence required him to say what could be said positively rather than to dwell on the negative and remain silent on the positive. "Counsel should spend little time in trying to paint a weed as a lily, *except to say what can be said positively* concerning his client's motives or tactics." COFFIN, A LEXICON OF ORAL ADVOCACY 29 (emphasis added). Petitioner's cursory treatment of this deficiency also ignores the fact that, in the absence of an affirmative case for mitigation, defense counsel's drawn-out discussion of so-called "aggravating factors" was entirely without purpose.

In his introductory remarks, defense counsel had already planted doubt about the existence of mitigating factors: "You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, and before the prosecution rushes to point out, if any, let me add a comma, and say if any." Argument pp. 8-9. Then, after describing "all the aggravating circumstances you ever want," defense counsel told the

jurors that he was going to discuss the "mitigating factors." Argument p. 16. At that point his style changed from the pointed, graphic, and direct statements about aggravating factors, to an almost incomprehensible, desultory discussion that ostensibly was about mitigation but gave only cursory treatment to the idea of leniency.[7]

Defense counsel began his "mitigation discussion" as follows:

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.

Argument p. 17. He then pointed out that there was no possible ground for mitigation other than the fact that

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[7] The denigration of Spisak was exacerbated by trial counsel's lengthy defense of his own performance. Instead of asking the jury to spare his client's life, trial counsel focused attention on how sorry he was that he had to argue on Spisak's behalf: "I hope that * * * when we walk out of this courtroom that I will have the same respect, and we will have the same friendship with both of these fine [prosecutors]; but I have got to argue because the Judge said was I ready for argument, so let me argue just a little bit." Argument pp. 35-36; see *id.* at 31-32 ("And if I did something wrong, if that's to be considered, so be it.").

"[w]e are a humane society." Argument p. 18. After stating that the defendant was undeserving of mitigation, counsel drifted into a meandering, half-hearted assertion that Spisak was mentally ill. As opposed to a persuasive argument that Spisak's mental illness warranted a life sentence instead of death, defense counsel limited his advocacy to repeating that defendant's mind was "sick" and "twisted" and that there was no hope of his rehabilitation. But cf. STEIN § 70, at 256 ("although a defendant's prospects for rehabilitation are a relevant topic for argument," even a prosecutor "may not discuss his or her own opinion of those prospects."); William Hazlitt, *Capital Punishments*, THE EDINBURGH REVIEW 247 (July 1821) (a sentence of death "ought not be inflicted for any act which does not * * * cut the individual completely off from all sympathy").

The remainder of defense counsel's closing was made up of further attacks on the defendant, impassioned argument that Spisak was undeserving of mitigation, and a rambling and incoherent discussion of the esteem in which defense counsel held the prosecution and the court and the overall integrity of the legal system. 465 F.3d at 705. At no point did defense counsel assert that Spisak's mental illness should lead the jury to avoid imposing a death sentence. Instead, he highlighted the difficulty of proving an insanity defense and rambled disjointedly about the medical opinions that had been offered:

- "If you find it mitigation, then, of course, you must find it * * * outweigh[s] the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us. And, ladies

and gentlemen, that is a pretty tall order." Argument p. 22.

- "[I]n the guilt portion, if anyone hasn't heard it up until now, let the word go out loud and clear, [defense counsel was] wrong, dead wrong, very, very wrong. We did not establish * * * that Frank Spisak was not guilty by reason of insanity." Argument p. 27.

- "And you heard the doctor say that it wasn't an exact science. Here's not two and two is four. And you heard the doctor, the doctor say that a couple hundred years ago, and we don't think of 200 years ago as being that unenlightened, we had a guy around then by the name of Benjamin Franklin, he had already invented electricity. * * * [B]ut at the same time they were, their contemporaries in the medical profession were sitting people down in chairs, putting hoods on their heads, and spinning them around, and that was thought to be a cure for the dementation, the twisted minds of the day." Argument pp. 38-39.

- "Somewhere along the way, we heard that earlier in our history, the learned medical men, the respected medical men of the day, thought that burning witches was the way that problems ought to be handled, if indeed they were witches. And they were no less respected." Argument p. 39.

- "And the job simply is to put personality aside, to weigh the mitigation, the smaller of the three jars, with the aggravating circumstances, which no question about it are substantial." Argument p. 45.

No possible tactical reason exists that would justify defense counsel's failure to present a coherent argument for mitigation. To the contrary, defense counsel's failure to present an affirmative case for mitigation effectively nullified Spisak's right to have the sentencing jury "give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir*, 550 U.S. at 246. Indeed, defense counsel was ineffective precisely because he derided and undermined Spisak's right to have evidence of mitigation given effect.

Given defense counsel's failure to present arguments in favor of mitigation, petitioner is left without any support for the argument that there was strategy behind counsel's deeply damaging discussion of aggravating circumstances. The combination of the two flaws—failing to argue mitigation coherently and aggressively arguing aggravation—resulted in the worst possible kind of closing argument. *Amici* would never encourage such an argument, and they strongly urge this Court not to give its imprimatur to such an argument as being even remotely within the bounds of acceptable advocacy.

C. Defense Counsel Was Wrong To Concede That The Death Penalty Would Be Justified

Not only did he fail to present a case for mitigation, but defense counsel also invited the jurors to impose the death penalty with clear consciences. He wrapped up his argument by reminding the jurors of the

negative impact of the trial on the families of the victims and on the jurors personally:

> [T]he sordidness, the awfulness of what we have experienced has to leave us. Ladies and gentlemen, it has to leave us a little bit older, and it has to leave us a little bit more jaded, and a little bit more hurt. My God, you've looked in the back of the courtroom, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. * * * And maybe * * * the sun won't really look as bright, and the air won't smell as sweet, and the air won't sing as nicely, and that's a shame, isn't it? It's a real shame that we can't all be back in the doll house existence where we once were, where Bambi ran in the forest and everything was good, and there was no evil.

Argument pp. 47-78. He then concluded by assuring the jurors that it would be just fine for them to return a sentence of death. No matter what, defense counsel concluded, whether the outcome was death or life, "whatever you do, we are going to be proud of you." Argument p. 49.

Petitioner argues that these statements were made only to "stress[] the jury's autonomy," an approach that petitioner suggests is reasonable in these circumstances. Pet. Br. 39 (asserting that STEIN § 206, at 15 and LANE & LANE § 23:102 "commend that approach."). Quite the contrary, there is no legitimate

reason for defense counsel's suggestion that he would be "proud" of the jurors for imposing a death sentence. Stein does instruct counsel to "[a]void *challenging* the jury to find for your client," but nowhere does he make the perverse suggestion that counsel should actually encourage the jury to find *against* his client. STEIN § 206, at 15 (emphasis added). Petitioner quotes Stein's statement that "[t]he better policy is to indicate by voice, manner, and words that you know the jury will do its duty under the law and under the evidence in the case," as if Stein were saying that counsel should avoid taking any position on what the result of the jury's performance of its duty will yield. But that is not what Stein says, as his example of a "nonoffensive but effective approach" in the next paragraph makes clear: "With this evidence, I believe you will be able to persuade yourself that the appropriate verdict is not guilty." *Id.* § 206, at 15-16; see LUBET Ch. 12, at 444 ("[T]he argument should bring together information * * * in a way that creates only one result."). That is a far cry from letting jurors off the hook for reaching the verdict that, counsel should be contending, is inappropriate. Whatever the desirability of ingratiating oneself with jurors, doing so by encouraging the very action *against* which counsel are supposed to be arguing goes too far, and it is not a technique suggested by any authority of which *amici* are aware.

In addition, defense counsel ignored the well-accepted tenet of trial advocacy that the advocate should ask the jurors for something specific, *i.e.*, let them know what result he wants them to reach. See, *e.g.*, Rose, 11 J. KAN. TRIAL LAW. ASS'N 18 ("One major failure of counsel in closing arguments is the absence of a specific request for jury action."). Thus, Stein does not recommend inviting the jury to rule against one's

client, but instead "repeatedly invit[ing] the jurors to change their minds," and inviting them to "persuade" themselves to reach the "appropriate verdict." STEIN § 206, at 15-16; see also HAYDOCK & SONSTENG § 3.09, at 70 ("The closing argument is the last opportunity the advocate has to explain and ask for a specific result."); LAGARIAS § 3.01, at 105 (2d ed. 1999) ("[A]ll counsel in summation must always consider the focused objective, the desired verdict they are seeking."); LUBET Ch. 12, at 444 ("[Y]ou must tell the jury, or the court, why your client is entitled to a verdict."); MOORE ET AL. Ch. 14, at 239 ("An effective closing argument typically discloses your desired verdict to the factfinder.").

Trial counsel failed even to ask the jury for the result his client sought, the imposition of a life sentence instead of a death sentence.

II. There Was No Strategic Reason For Defense Counsel's Incorrect Statement Of Aggravating Factors

It is settled Ohio law that only statutorily enumerated aggravating factors can be considered as grounds for a death sentence. OHIO REV. CODE §§ 2929.03, 2929.04. "[T]he nature and circumstances of the crime may not be weighed against the mitigating factors." See *State* v. *Williams*, 99 Ohio St. 3d 493, 514 (2003) (citing *State* v. *Wogenstahl*, 75 Ohio St. 3d 344, 356 (1996)). Yet, with a complete disregard for what is and is not permissible as an aggravating factor under Ohio law, defense counsel characterized the graphic details of the murders as "[a]ggravating circumstances, all the aggravating circumstances you ever want." Argument p. 16. Defense counsel lingered on the "smell," the "feel," the "loneliness" and the "terror" of

the murders. *None* of these descriptors was an "aggravating circumstance" that the jury was allowed to consider, yet these are the factors on which defense counsel encouraged the jurors to focus their attention.

Petitioner defends counsel's misstatement that virtually all of the circumstances of the crimes were "aggravating" as a reasonable "decision to bolster his own sincerity by criticizing his client's indefensible views." Pet. Br. 38. Petitioner cites for support the undisputed proposition that "'[t]he effect of sincerity is heightened if it appears that your code of morality and judgment of what is right and wrong coincide with the code of morality of the jury.'" Pet. Br. 38 (quoting STEIN § 204, at 10). But counsel's purpose in building credibility through sincerity is that he will then be better able to "convince the jury that [he] believe[s] what [he is] asking them to believe." STEIN § 204, at 10. Likewise, petitioner points out that counsel in closing argument "'should indicate to the audience that the speaker shares the attitudes of the listener.'" Pet. Br. 38 (quoting PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT § 2.06, at 100-01 (1st ed. 1998)). Lagarias explains, however, that the point of doing so is "that, in turn, the listener will respond positively to the views of the speaker." LAGARIAS § 2.06, at 97 (2d ed. 1999). If the speaker has no views that can be helpful to his client, the exercise is moot.

Counsel's misstatement of the law, to the detriment of his own client, cannot have been the result of a strategic plan. Even if it had been appropriate for defense counsel to describe the "horrendous" nature of the crimes at such length and in such great detail, it would not have been reasonable for him to have labeled

numerous graphic details of the crimes as "aggravating factors" when they were not.

Similarly, there can be no justification for defense counsel's assertions that the defendant's views on Nazi Germany and the Holocaust were aggravating circumstances the jury should consider in sentencing. After emphasizing the brutality of the crimes and the pain felt by the victims, defense counsel began relating the commission of those crimes to Nazi Germany:

- "Isn't what you heard just a microc[o]sm of a twelve year reign of terror that was unparalleled in history, the Third Reich, and it was going to last for a thousand years." Argument p. 14.

- "They talked about crystal night. * * * crystal night when they broke out every window and ruined the business of every Jewish businessman in Germany. Crystal night, and it is funny? But to think if [sic] is awfully funny, you have to have a sick twisted mind." Argument pp. 14-15.

- "And listen to this sick distorted mind, and you will hear once again * * * those hobnail boots on the cobblestone streets, but, ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and you won't hear the gas at Auschwitz, because, ladies and gentlemen, it never made any noise in killing six million." Argument p. 15.

Finally, defense counsel focused the jury on yet another non-statutory aggravating factor, the pain and suffering of victims' families. The prosecution could not have introduced evidence of the families' suffering or

invoked it in the prosecution's own closing argument. *State* v. *Reynolds*, 80 Ohio St. 3d 670, 679 (1998). The prosecution did not need to, however, because defense counsel did just that, noting how important the sentence would be to the victims' families and reiterating that "[t]here are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces." Argument p. 13.

Defense counsel summed up his "aggravating circumstances" review for the jury, stating:

> [I]f each drop of blood in this sick demented body were full [of] atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much of life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford.

Argument p. 16.

There was no strategic reason for defense counsel's repeated references to any of these impermissible "aggravating factors." HAYDOCK & SONSTENG § 3.81, at 127 ("The advocate may not argue a personal interpretation of the law applicable to the case. * * * It is improper to misstate or misinterpret the law."); LUBET Ch. 12, at 499 ("Counsel may not, however, misstate the law."); TIGAR Ch. 5, at 152 ("The law is something the jurors care about. You must stress the important principles of law that guide decision."); MCELHANEY Ch. 78, at 669 ("You may not misstate the

* * * law."). Indeed, counsel's emphasis on these things cannot be attributed to anything other than his own apparent disgust for Spisak. But closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." LAGARIAS § 1.21, at 44 (2d ed. 1999). Defense counsel was well outside the bounds of sound strategy.

Further, defense counsel cannot have been anticipating that the prosecutor would make any of these arguments, since the prosecutor would not have been able to raise these points. Indeed, the statements made by defense counsel would easily have been prosecutorial misconduct if made by the prosecutor. See *Williams*, 99 Ohio St. 3d at 515 ("[I]t is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are aggravating circumstances.") (quoting *Wogenstahl*, 75 Ohio St. 3d at 356) (quotation marks and alterations omitted); see generally STEIN § 14, at 38 ("Scrupulous care must be exercised by the prosecutor in arguing capital cases because of the uniqueness of the death penalty."); A.B.A. Standards for Criminal Justice, Prosecution Function Standards § 3-5.8 (3d ed. 1993). The rationale behind prophylactically addressing the weaknesses in one's own case is that "the mosquito repellant is more effective than the mosquito bite lotion." RANDALL H. SCARLETT, ART OF ADVOCACY: SUMMATION § 1.34, at 1-39 (2008). But here, where the prosecutor could not have raised these issues as aggravating factors, there was no sound reason for defense counsel to do so. This is especially true "[i]n the penalty phase argument in death penalty cases," where "the prosecutor may not

argue prejudicial information, such as that the defendant possessed religious materials, not relevant to the moral culpability of the defendant." LAGARIAS § 1.36, at 73 (2d ed. 1999).

Perhaps if defense counsel had asked the jury at any time for leniency on Spisak's behalf, credibility building might have been a strategic effort. But in the context of the closing argument as a whole, counsel's overstatement of aggravating factors served no strategic purpose.

CONCLUSION

The Court should affirm the Sixth Circuit's determination that defense counsel's performance fell below the standard for effective assistance of counsel.

Respectfully submitted.

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